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No. 94 738

In The
Supreme Court Of The United States
October Term, 1994

CITY OF NEW HAVEN, ET AL.
Petitioners

v.

WALTER KUNTZ
Respondent

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals for the Second Circuit err when it affirmed the ruling of the trial court that a New Haven, Connecticut Police Sergeant who had suffered a 62.5 percent permanent partial disability of the heart was capable of performing all the "essential functions" of a New Haven Police Lieutenant and had therefore been illegally deprived promotion to Police Lieutenant, in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794, and the Americans with Disabilities Act, 42 U.S.C. 12, 101 et seq., even though

(i) his own cardiologist and the certified police physician testified that it was medically unacceptable for him to supervise police officers on the street in the investigation, interrogation, apprehension and arrest of criminals,

(ii) his own witnesses, including an experienced New Haven Police Lieutenant and the Chief of Police, testified that Lieutenants are routinely assigned to supervise police officers on the street in the investigation, interrogation, apprehension and arrest of criminals,

(iii) the job description for a New Haven Police Lieutenant contemplates such assignments, and

(iv) the history of the New Haven Police Department demonstrates that such assignments are routinely given to Lieutenants.

PARTIES TO PROCEEDINGS BELOW

1. Walter Kuntz, Plaintiff-Respondent

2. City of New Haven; City of New Haven Dept. of Police Services; William Farrell; Nicholas Pastore Individually, and in his official capacity as current NHPD Chief of Police; Arthur Ferrucci, John McDevitt, Jose Santiago, Charles Valentine, Jr., John Horvath, Individually, and as members of the New Haven Board of Police Commissioners (NHBPC).
Defendants-Petitioners

Alfred J. Ranieri, Dr.,
Individually and as consulting physician to the NHPD,
Defendant (Doctor Ranieri was dismissed from the case by Stipulation prior to trial.)

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1. The Writ should be granted because the appellate panel and the trial judge, despite paying "lip service" to established principles of law, have *sub silentio* established new principles of law inconsistent with (i) the express language of the statutes at issue, (ii) the prior rulings of every other court which has addressed similar issues in the context of law enforcement, and (iii) the express and uncontradicted testimony of Sgt. Kuntz's own cardiologist, the certified Police Department physician, and the New Haven Police officials called to testify by Sgt. Kuntz 7

2. While we believe the Americans With Disabilities Act provides the plaintiff with no greater rights than the Rehabilitation Act, it must also be observed that the relevant portions of the ADA did not take effect until July 26, 1992, and therefore any relief arguably available to the respondent under that law would not be effective until that date .. 16

3. If we are correct that the rulings below should be reversed, then the respondent is no longer the "prevailing party" and is no longer entitled to an award of attorney fees and costs 16

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* *Note:* Counsel of record for Defendants-Petitioners was orally informed by trial/appellate counsel for the government that *Paegle* had been appealed to the U.S. Court of Appeals for the District of Columbia Circuit and had very recently been affirmed per curiam. However, I have not been able to locate any citation in Shepard's Citator.

Simon v. St. Louis County, 497 F.Supp. 141, 143-147, 150-151 (E.D.Mo.1980), rev'd in relevant part, 656 F.2d 316, 319-21 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982), on remand, 563 F.Supp. 76 (E.D.Mo. 1983), aff'd, 735 F.2d 1082 (8th Cir. 1984) 8

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PETITION FOR A WRIT OF CERTIORARI

ORDER BELOW

The petition challenges an Order of the Court of Appeals for the Second Circuit filed June 24, 1994, affirming a Memorandum of Decision and Order of the United States District Court for Connecticut, the latter filed March 3, 1993, Judgment entered March 10, 1994, Ruling on Post-Judgment Motions filed June 18, 1993, Supplemental Judgment entered June 30, 1994, Amended Supplemental Judgment entered January 6, 1994.

A timely petition for rehearing with a suggestion for rehearing en banc by the members of the Court of Appeals was denied on August 29, 1994. A Motion to Stay the Mandate was granted for a period of thirty (30) days by the court of appeals on September 14, 1994.

_____

JURISDICTION

The jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioners rely on the following:

Rehabilitation Act of 1973.

Section 794(a) of Title 29 of the United States Code:

Nondiscrimination under federal grants and programs.

Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service....

Note. Pub.L. 102-569 (1992), Sec. 102(p) (32) substituted "a disability" for "handicaps" and "disability" for "handicap."

Pub.L. 100-630 (1988), Sec. 206(d) (1), substituted "her or his handicap" for "his handicap."

Pub.L. 99-506 (1986), Sec 103(d) (2) (B), substituted "individual with handicaps" for "handicapped individual" wherever appearing.

Americans With Disabilities Act.

Section 12, 112(a) of Title 42 of the United States Code:

General Rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Section 12, 111(8) of Title 42 of the United States Code:

Qualified individual with a disability.

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

STATEMENT OF THE CASE

Plaintiff-Respondent Walter Kuntz was a Sergeant in the New Haven Department of Police Services for nearly 20 years.

In 1984 Sergeant Kuntz suffered a heart attack, and some months later he underwent triple bypass heart surgery. When he returned to work he was assigned to "light duty," *i.e.*, interviewing references for prospective employees, lecturing youth and community groups on crime prevention, supervising police dispatchers.

Since his heart attack Sgt. Kuntz has never performed more stressful police tasks, and he has never participated in or supervised the investigation, interrogation or apprehension of criminal suspects on the street.

Sgt. Kuntz' own cardiologist, Dr. Alan Radoff, determined that at maximum recovery the Sergeant suffered a 50 to 75 percent permanent partial disability due to his heart condition. The 62-1/2 percent heart disability Workers' Compensation award to Sgt. Kuntz was the highest in the City's history.

In 1986, while still limited to such "light duty" work, he passed the eligibility examination for promotion to Lieutenant. In 1988, when his name was reached on the eligibility list, he was tentatively promoted to the rank of Lieutenant, but explicitly subject to his passing a qualifying medical examination. The promotion was denied because of a determination that Sgt. Kuntz was not medically qualified for the promotion, *i.e.*, it was medically unacceptable for him to perform many of the duties routinely assigned to a New Haven Police Lieutenant and he was therefore not capable of being a "full duty" New Haven Police Lieutenant.

The initial Complaint alleged a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794. Seven months after the close of trial, while awaiting the trial court's ruling, the Complaint was amended to add an alleged violation of the Americans With Disabilities Act, 42 U.S.C. Sec. 12,101 et seq.

Testimony at trial by the New Haven Police Lieutenant called by Sgt. Kuntz acknowledged that many of the assignments routinely required of a New Haven Police

Lieutenant require on-the-street supervision of such activities as the forcible execution of search or arrest warrants, or the management of high speed pursuits, or the investigation, interrogation, apprehension and arrest of armed and dangerous criminals and persons possibly under the influence of illegal drugs or alcohol.

Nearly every other person promoted to Lieutenant from the same eligibility list applicable to Sgt. Kuntz served in such high stress and high risk assignments, and all were subject to such assignments.

Sgt. Kuntz' own cardiologist testified it was *not* medically acceptable for him to serve in such assignments, and the certified police physician testified there was no way he or any other physician of whom he was aware would clear Sgt. Kuntz for such assignments.

Nevertheless, a United States Magistrate, sitting without a jury, concluded that Sgt. Kuntz was "otherwise qualified" to perform "all the essential functions" of a New Haven Police Lieutenant and was therefore denied rights under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1991 when he was denied the promotion to Police Lieutenant.

The Magistrate concluded that "the physically strenuous" aspects of a lieutenant's position are " 'proportionately so insignificant that [they] cannot be considered as an essential function of [his] position," and that the essential functions of a New Haven Police Lieutenant are "overwhelmingly, if not exclusively, supervisory in nature."

In other words, the Magistrate treated such terms as "supervise," "administer" and "manage," as generic terms, failing to distinguish between the supervision of telephone dispatchers, on the one hand, and the supervision of police officers on the street and engaged in the investigation, apprehension, interrogation and arrest of armed suspects. The Magistrate also ignored the medical testimony that it was *not* medically acceptable for a "Lt." Kuntz to serve in such high stress assignments.

A panel of the United States Court of Appeals for the Second Circuit affirmed by summary order, and a timely petition for rehearing and suggestion of en banc hearing was

denied.

With only one exception the appellate panel merely recited the Magistrate's generic conclusion that "the 'essential functions'...are overwhelmingly, if not exclusively, supervisory in nature."

The one exception was the panel's referral to the formal Job Description, which it somehow interpreted as implicitly excluding many of the very assignments and duties that Sgt. Kuntz' own witnesses conceded were within the routine responsibilities of a New Haven Police Lieutenant.

A Stay of the Mandate was granted on September 14, 1994, for a period of thirty (30) days.**

** Citations to the record hereinafter are, respectively, to the Trial Record and to the Deferred Joint Appendix on appeal.

REASONS FOR GRANTING THE WRIT

1. The Writ should be granted because the appellate panel and the trial judge, despite paying "lip service" to established principles of law, have *sub silentio* established new principles of law inconsistent with (i) the express language of the statutes at issue, (ii) the prior rulings of every other court which has addressed similar issues in the context of law enforcement, and (iii) the express and uncontradicted testimony of Sgt. Kuntz's own cardiologist, the certified Police Department physician, and the New Haven Police officials called to testify by Sgt. Kuntz. In fact, the rulings below are so facially inconsistent with the law and facts that they should be summarily overturned.

Every other court that has considered the essential functions of law enforcement officers has recognized that a person in respondent's position could not perform all the "essential functions" of the position which he desired.

Virtually every other court ruling we have been able to locate concerning a law enforcement officer is inconsistent with the conclusion of the Magistrate and the Court of Appeals.[1]

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[1] *Butler v. Thornburgh*, 900 F.2d 871 (5th Cir.1990), *cert. denied*, 498 U.S. 998 (1990); *Copeland v. Philadelphia Police Dept*, 840 F.2d 1149 (5th Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989) (reasonable accommodation of drug addicted officer would require substantial modification of essential job functions); *Paegle v. Department of Interior*, 813 F. Supp. 61 (D.D.C. 1993), (Police officer recovering from back injury and on limited duty was not qualified to be promoted to sergeant) (*Note:* affirmance per curiam has been orally communicated by trial/appellate counsel for the government in *Paegle*, I have not been able to locate it in Shepard's); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd* 865 F.2d 592 (3rd Cir. 1989) (diabetic applicant could not perform essential job functions); *Mahoney v. Ortiz*, 645 F. Supp. 22 (S.D.N.Y. 1986) (applicant with five prior shoulder dislocations could not perform essential job functions); *Coski v. City & County of Denver*, 795 P. 2d 1364 (Colo. Ct. App. 1990) (reasonable accommodation of quadraplegic officer not required); *Desper v. Montgomery County*, 727 F. Supp. 959, 963 (E.D. Pa. 1990) (undercover narcotics officer who had become addicted to drugs but had gone through rehabilitation need not be reemployed because accommodating him would require substantial modification of essential

(continued on next page)

The plain terms of the job description of a New Haven Police Lieutenant include numerous assignments a "Lieutenant" Kuntz could not perform.

The Job Description of a New Haven Police Lieutenant includes the following:

(i) "[i]nterview[] complainants and take[] proper action to dispose of the complaints;"

(ii) "[a]ssis[] in the supervision of the criminal investigation and identification activities of the department;"

(iii) "investigate[] serious or difficult cases;"

(iv) "interrogate[] suspects and witnesses;"

(v) "[s]upervise[] the activities of the department's youth services;"

(vi) "[p]erform related work as required;"

(vii) "plan, assign and supervise the work of subordinate officers and other personnel;"

(viii) "deal firmly...with people;"

(ix) "analyze situations quickly...and determine proper courses of action to be taken;"

(x) "communicate effectively, orally...;"

(xi) "establish and maintain effective working relationships with fellow employees and the public." [Job Description of New Haven Police Lieutenant, Plaintiff's Trial Exhibit 1, Def.Jt.App., Vol. II, pp. 53-54.]

Nothing in that job description suggests or supports the *exclusion* of the investigation, confrontation, interrogation, apprehension or arrest of an armed and dangerous criminal suspect, *i.e.*, the very duties described by the New Haven Police Lieutenant called to testify by Sgt. Kuntz and actually assigned to every person promoted to Lieutenant. (See *infra.*)[2]

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law enforcement function); *Simon v. St. Louis County*, 497 F. Supp. 141, 143-147, 150-151 (E.D. Mo. 1980), *rev'd in relevant part*, 656 F.2d 316, 319-21 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982), *on remand*, 563 F. Supp. 76 (E.D. Mo. 1983), *aff'd*, 735 F.2d 1082 (8th Cir. 1984) (paraplegic could not perform essential law enforcement functions). *Note:* We have not included cases finding no handicap or disability.

[2] *Reliance on the formal job description.* The appellate panel expressly addressed only the terms of the formal *(continued on next page)*

The uncontradicted testimony of Respondent's own witnesses are inconsistent with the trial and appellate ruling.

Lt. Michael Andreucci, the 14 year New Haven Police Lieutenant *called by Sgt. Kuntz,* described the actual potential duties of a Lieutenant.

A. A Lieutenant might be exposed to "stress" and "high anxiety."

> I can't specify any particular incidents, but every day in the life of a police officer you never know what you're going to be confronted with,.... *It could be a stressful situation, it could be a high anxiety situation.*

[Def.Jt.App.,Vol.I, p.338 (emphasis added).]

B. A Lieutenant might have to supervise officers in such dangerous and stressful assignments as the forcible execution of search or arrest warrants, in the investigation and apprehension of armed and dangerous felons and persons under the influence of illegal drugs or alcohol, or in the execution of high-speed pursuits.[3]

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job description even though the law is clear that one must examine the actual implementation of the job. *Hall v. United States Postal Service,* 857 F.2d 1073, 1079 (6th Cir. 1988), cited by the Magistrate in this case, and in turn citing *School Bd. of Nassau County v. Arline,* 480 U.S. 273, 287, *reh. denied,* 481 U.S. 1024 (1987).

[3] In response to cross-examination Lt. Andreucci agreed with each of the following possible duties of a New Haven Police Lieutenant:

- that "sometimes lieutenants serve in investigative services..." "[where they] investigate serious felonies or more serious crimes..." "that might include an individual who is armed..." "[or] that might include an individual who is under the influence of a drug or mind altering substance" [TR. Jan. 27, 1992, p. 22, 25, Def.Jt.App.,Vol.I,pp.343,346],
- that "sometimes a lieutenant will serve as as [sic] assistant shift commander"..."who may well respond a good portion of his time out on the street," "and there are occasions when both [the shift commander and the assistant shift commander]... are out on the street at the same time and then when the shift commander is off-duty, the assistant would run the shift" [TR. Jan 27, 1992, pp. 22, 23, 25, Def.Jt.App.,Vol.I,pp.343,344, 346],
- that "as an assistant shift commander, even when you're a lieutenant and if a high speed chase occurs, you might be responsible for directing that chase" [TR. Jan. 27, 1992, pp. 25, Def.Jt.App.,Vol.I,p.346],
- that the lieutenant in charge of street *(continued on next page)*

C. A Lieutenant might have to supervise the following units that do involve the investigation and apprehension of armed or otherwise dangerous felons — Assistant Shift Commander in Patrol, officer in charge of Investigative Services, officer in charge of Street Crime, officer in charge of Juvenile Services, officer in charge of Narcotics. [TR Jan. 27, 1992, pp.22-25, Def.Jt.App., Vol. I, pp. 343-346.]

Lt. Andreucci emphasized that "I wouldn't minimize the lieutenant on the street... because you never know what you're going to be confronted with. Anything is possible. Anything could happen." [TR Jan. 27, 1992, pp. 24-25, Def.Jt.App., Vol. I, pp. 345-346.][4]

In other words, a *police supervisor* of sworn police personnel must be capable of supervising subordinates in *police work — i.e.,* the 10,000 arrests per year testified to by Personnel Officer Sgt. Walter Northrop, and the 100,000 annual police-citizen contacts leading to the arrests or possible violent confrontations. Furthermore, that police supervisor must be capable of personally arresting persons. [Def.Jt.App., Vol.I,pp. 134-135, 431-432.]

The actual primary assignments of Lieutenants are those that Respondent is medically incapable of performing.

Fifteen out of the seventeen persons promoted to Lieutenant from the list served in high risk assignments — Assistant Shift Commander in Patrol (three shifts), Commander of Investigative Services (Detectives), Deputy Commander of Investigative Services, Juvenile Services (a

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crime "includes knocking down doors and serving search and arrest warrants," and if his subordinates took a door down and he found himself confronting an armed suspect he "would take the necessary action that would be required of [him]," "[i]f he had a weapon pointed at me or one of my subordinates, I would have to react and I would take the necessary action" [TR. Jan. 27, 1992, pp. 25, Def.Jt.App.,Vol.I,p.346].

[4]Major Daniel Blackmon, a Community Affairs Officer who admitted he would not likely hear of specific instances of violence involving Lieutenants on the street, was also called by the plaintiff, and agreed that Lieutenants may face danger and that one cannot predict when it will occur. [Testimony of Maj. Daniel Blackmon, TR. Jan. 13, 1992, pp. 46-49, 52, 59, 63-64, Def. Jt. App. 198-201, 204-205, 207-208.]

separate segment of Investigative Services), officer in charge of Street Crime (conducts raids and serves arrest and search and seizure warrants). [Plaintiff's Exh. 42, Def.Jt.App., Vol.II, pp. 94 through 104.][5]

Also, all those "full duty" Lieutenants were available for a demonstration or police emergency, if another Lieutenant had a day off or an illness or a family emergency, to fill overtime needs in the higher risk assignments, or just for general reassignment when deemed desirable.

It is important to note that the Police Department has 350 authorized uniformed personnel, but only eighteen (18) authorized Lieutenants. In fact, until 1992 there were only twelve (12) authorized Lieutenants. [Testimony of Sgt. Walter Northrop, Def.Jt.App.,Vol.I,p.258.]

The Chief needs flexibility in assigning Lieutenants.

Chief of Police Pastore described both the need and the desirability of flexibility in the utilization of his supervisory officers — to fill necessary openings, to familiarize supervisors with all aspects of the department, and to facilitate advancement of women and minorities. Chief Pastore also described his nationally recognized and replicated Community Based Policing which seeks to return all uniformed officers to the streets and neighborhoods and replace "light duty" officers with civilians. [Testimony of Chief Nicholas Pastore, TR Jan. 17, 1992, pp. 17-37, 53-54, Def.Jt.App., Vol.I, pp.300-320, 327-328.]

Lieutenants recently involved in armed confrontations. At least two of the persons promoted to Lieutenant from the same eligibility list applicable to the plaintiff were directly involved in armed confrontations and one was involved in an actual

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[5] "Full duty" Lt. James Sorrentino continued to serve in the Financial Planning Unit because of his expertise, but he was also utilized to routinely supervise crowd control at public events. [Def.Jt.App.,Vol.I,pp.283-287, Vol.II,p.100.]

"Full duty" Lt. Stephen Jankowski was for years Officer in Charge of Records Division or Communications Division (sometimes both divisions supervised by the same person, e.g., see Carl Giannotti), but he also was available for outside assignment and did overtime and extra duty work in other assignments. [Def.Jt.App.,Vol.II,pp.98,102.]

shooting — Lt. Towles and Capt. (formerly Lt.) Giannotti. [Testimony of Major Blackmon, Def.Jt.App.,Vol.I,pp.207-208; Testimony of Sgt. Walter Northrop, Def.Jt.App.,Vol.I, pp.289-290.]

Department Rules require the ability to perform all duties. Department Rules require that a person otherwise eligible for promotion first be examined by "physicians recommended by the Chief of Police and approved by the Board of Police Commissioners," who must certify in writing that the applicant is "physically qualified to perform the duties of such advanced rank and is free from any chronic impairments likely to interfere with the efficient performance of the duties" of such appointee to the advanced rank. [Department Rule 13, Plaintiff's Trial Exhibit 5, Def.Jt.App., Vol. II, p. 63.]

Sgt. Kuntz did not receive such approval.

Department practice demonstrates the requirement to perform all potential duties. There is no evidence whatsoever that anyone has ever been promoted to a supervisory position in the New Haven Police Department who has not been eligible for "full duty" at the time of promotion, *i.e.*, eligible to perform all the duties to which the officer might be assigned.[6]

The Department's certified physician refused to approve Respondent for any street supervisory assignments. The Police Department's certified physician, with nearly 15 years experience examining and treating New Haven Police Officers and evaluating them for promotion, testified that no doctor

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[6] The witnesses at trial provided personal histories in the New Haven Police Department going back nearly forty (40) years, and of course institutional history even longer. [Testimony of former Chief William Farrell, TR, Jan. 27, 1992, pp. 51-64, 79, 82-83, Def.Jt.App.,Vol.I,pp.375-388,400, 401-402.]

In fact, former Sgt. Robert McCarthy suffered a heart attack and underwent bypass surgery in 1983, but was *not* promoted after suffering the heart attack and undergoing heart bypass surgery, although eligible. In April 1991 he retired days before he was to be examined by Dr. Ranieri in order to determine if he should be involuntarily retired under Departmental Rule 17 because of physical inability to perform the duties of a police officer. [Dec. 6, 1991, Deposition/Trial Testimony of Dr. Alfred Ranieri, TR pp. 27-29, Def.Jt.App.,Vol.II,pp.131-133.]

in his right mind would clear the plaintiff for any of the duties that would place him in the street with possible exposure to armed or dangerous felons.[7]

Dr. Alfred Ranieri testified:

> A. . . . [T]here's no way that I or any other physician that I know of would clear him to be a street cop.
>
> . . .

[Def.Jt.App.,Vol.II,pp.153-154.]

> A. He shouldn't be on the street at all, because you can't manage someone without potentially getting involved. . . [H]ere's a note from Dr. Radoff in August of 1985,. . . . , says,. . . that Mr. Kuntz is capable of doing sedentary work. However, he previously was a full duty officer, and he clearly would be unable to return to this line of employment. That's Dr. Radoff, the patient's physician, in August of 1985. And the one thing that even a layperson must know, cardiac disease doesn't get better with time, it gets worse. So I mean there's no way that anybody is going to clear him to go be a street cop or a front-line police officer. Sedentary work, fine.

Respondent's own cardiologist testified that it was not "medically acceptable" for him to perform assignments that might expose him to high degrees of stress, and particularly assignments that might expose him to armed or dangerous criminals.

Dr. Alan Radoff, Sgt. Kuntz's cardiologist, initially agreed that the Sergeant was capable of "activities involving supervision, management, and administration of others," but only because the doctor had been misled by Sgt. Kuntz into

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[7]It is true that for a period of years the Chief of Police was directed by the Police and Fire Pension Board to not forcibly retire officers, such as Sgt. Kuntz, found not capable of performing "full-duty" police work after having reached maximum recovery. That was because of temporary restraints imposed due to the fact that the Police and Fire Pension Fund was having fiscal problems. [Testimony of Sgt. Walter Northrup, TR. Jan 14, 1992, pp. 28-29, Def.Jt.App.,274-275.] Sgt. Kuntz could have voluntarily retired, but chose to stay on at full pay but excused from performing dangerous police assignments.

believing that the Sgt. would *not* have to undertake any assignments that would require supervision of units enforcing the criminal laws on the street.

In order to be certain there was no misunderstanding, counsel for the defendants presented Dr. Radoff with a number of scenarios where a *police* Lieutenant might be required to supervise, in each instance utilizing the duty referenced in the Job Description of the Police Lieutenant [Def.Jt.App.,Vol.II, pp.166-176] and placing those duties into real life scenarios that a *police* supervisor might confront, *e.g.*, confronting someone suspected of being an armed and dangerous felon. [Def.Jt.App.,Vol.II,pp.166-176.]

As to each of those scenarios Dr. Radoff answered "no," it was *not* "medically acceptable." Sgt. Kuntz could not supervise persons in those circumstances without risk to his life or others depending on him. [Def.Jt.App.,Vol.II,pp.166-176, 203.]

Further in order that there not be any misunderstanding about the thrust of questions which repeatedly asked whether Sgt. Kuntz would be "physically capable" of supervising in the varying scenarios presented, the following was also asked by counsel for the defendants/petitioners:

> "I've been talking in all these scenarios where you said no as to whether he would be physically capable, when I say physically capable, *what I'm asking is might he be subjected to such stress that it could adversely aggravate his heart condition?*"

[Def.Jt.App.,Vol.II,p.178 (emphasis added).]

Dr. Radoff's answer to this clarifying question was a firm "Yes." [Def.Jt.App.,Vol.II,p.179.]

Dr. Radoff then expressed surprise at my question. [Question by Dr. Radoff:]

> "... I have a question for you. Has not Mr. Kuntz been involved in these potential scenarios as a sergeant?.... In actuality he [Sgt. Kuntz] told me he has been involved in purely administrative duties.... And he has *never had been asked or never would be asked to be involved in situations such as you describe.*"

[Def.Jt.App.,Vol.II,p.179 (emphasis added).]

Of course Sgt. Kuntz has not been asked and would not be asked to participate in such scenarios — because for the remainder of his career he would be only required to perform *as a "light-duty" officer or a "light-duty" supervisor, i.e.,* he would only be required to perform certain discrete portions of the job.

Furthermore, Dr. Radoff candidly admitted that his only direct knowledge of police work is what comes from television. [Def.Jt.App.,Vol.II,p.172.]

State Court cases define the duties of all police officers as more than Respondent could perform. Failure of a "peace officer" to intervene to arrest or protect another person exposes that officer to a claim of negligence under State law. *Shore v. Stonington,* 187 Conn. 147, 444 A.2d 1379 (1982) (failure to timely intervene with unruly crowd exposed police officer to claim of negilgence in the shooting of a bystander).

Danger to the applicant for promotion, to a fellow officer, or to a third party is a legitimate government concern in denying a promotion. *Southeastern Community College v. Davis,* 442 U.S. 397, 405-413, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); *Kampmeier v. Nyquist,* 553 F.2s 296 (2d Cir.1977).

The only excuse for failing to carry out such responsibility would be if the officer is not medically capable of doing so (or otherwise restricted, for example, for disciplinary reasons), and that is precisely the excuse available to a Sgt. Kuntz and a "Lt." Kuntz."[8]

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[8] *State law defines the duties as more than Respondent could perform.* In Connecticut *every* city police officer is a "peace officer," and he or she "*shall arrest*...any person for any offense in their jurisdiction, when the person is taken or apprehended in the act or on the speedy information of others,...." Connecticut General Statutes, Section 54-1f(a).

There is nothing in that statute to indicate that a supervisory police officer is excused from that duty.

In denying our petition for rehersing and en banc hearing the Second Circuit correctly observed that we did not cite the foregoing statute to the Magistrate at trial.

However, that does not justify either the Magistrate's ruling or that of the Court of Appeals in view of the other overwhelming evidence adduced

(continued on next page.)

2. While we believe the Americans With Disabilities Act provides the plaintiff with no greater rights than the Rehabilitation Act, it must also be observed that the relevant portions of the ADA did not take effect until July 26, 1992 [Pub.L. 101-336, Sec. 108], and therefore any relief arguably available to the respondent under that law would not be effective until that date.

3. If we are correct that the rulings below should be reversed, then the respondent is no longer the "previaling party" and is no longer entitled to an award of attorney fees and costs.

Respectfully submitted,

/s/Martin S. Echter
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(203) 787-8232
Fed. Bar No. ct07596
Attorney for Petitioners
Attorney of Record

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at trial.

Also, as indicated above, the law is clear that one must examine the actual implementation of the job. *Hall v. United States Postal Service*, 857 F.2d 1073, 1079 (6th Cir. 1988), and in turn citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287, *reh. denied*, 481 U.S. 1024 (1987).

No. _____

In The

Supreme Court Of The United States

October Term, 1994

CITY OF NEW HAVEN, ET AL.

Petitioners

v.

WALTER KUNTZ

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

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In the United States District Court for the District of Connecticut

Walter Kuntz	Civil No. N-90-480 (JGM)
v.	
City of New Haven, et al.	Date: March 3, 1993

MEMORANDUM OF DECISION

On September 11, 1990, plaintiff Walter Kuntz commenced this action against defendants City of New Haven ["City"], its Department of Police Services ["NHPD"], former NHPD Chief William Farrell, current NHPD Chief Nicholas Pastore, individually and in his official capacity, and Arthur Ferrucci, John McDevitt, Jose Santiago, Charles Valentine, Jr. and John Horvath, individually and as members of the New Haven Board of Police Commissioners ["NHBPC"], as well as Dr. Alfred J. Ranieri, individually and as consulting physician to the NHPD.[1] Plaintiff alleges violation §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, on account of defendants' refusal to promote him from sergeant to lieutenant, because of his heart condition.[2] Plaintiff seeks an order directing defendants to promote him to lieutenant, retroactive to September 1988, and he seeks back pay representing the difference between lieutenant's and sergeant's salary, and general damages as provided by §504 and 42 U.S.C. §1983.

On March 1, 1991, plaintiff filed his motion for preliminary injunction (Dkt. ##14-15). On August 26, 1991, plaintiff moved to consolidate the hearing on his motion for preliminary injunction with a trial on the merits (Dkt. #31), which motion was granted, by agreement of counsel, on January 13, 1992. On that same date, the parties consented to a court trial before

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[1]The complaint against Dr. Ranieri was dismissed by stipulation on January 10, 1992 (Dkt. #64).

[2]*See* note 32 *infra*.

this Magistrate Judge, with any appeal to be taken directly to the Second Circuit (Dkt. #53).

A four-day trial was held on January 13, 14, 17 and 27, 1992, at which eleven witnesses testified.[3] Plaintiff admitted forty-five exhibits (Exhs. 1-4, 4A, 5-9, 9A, 10-34, 37-39, 41-42, 47A, 48-50), and defendants admitted six exhibits (Exhs. B-D, F, H-a, H-b).[4] Plaintiff filed his post-trial briefs on March 9, 1992 and April 1, 1992 (Dkt. ##61 & 63); defendants' post-trial brief was filed on March 9, 1992 (Dkt. #59).

For the reasons stated below, judgment will enter for plaintiff.

I. FINDINGS OF FACT

The following constitutes the Court's findings of fact, pursuant to Fed. R. Civ. P. 52(a):

Plaintiff joined the NHPD on May 1, 1955 as a patrol officer; after fourteen years, he was promoted to sergeant on December 23, 1969 (Tr. at 119-20). For the first six years, plaintiff was a patrol sergeant, for which he was in charge of one-quarter of the city and supervised eight to twelve officers on an eight hour tour of duty (Tr. at 120). In August 1976,

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[3]The January 13th transcript was filed on February 14, 1992 (Dkt. #55), consisting of pp. 1-217 ["Tr."]; the January 14th transcript was also filed on February 14, 1992 (Dkt. #56), consisting of pp. 1-75 ["*Tr.*"]; the January 17th transcript was filed on February 19, 1992 (Dkt. #57), consisting of pp. 1-61 ["Tr."]; and the January 27th transcript was also filed on February 19, 1992 (also Dkt. #57), consisting of pp. 1-181 ["*Tr.*"].

The witnesses for plaintiff, in order of their testimony, were as follows: Daniel Blackmon, retired Major for the NHPD; John Ambrogio, Chief of Police for the Town of Hamden; Walter Connor, retired Major for the NHPD; plaintiff; Walter Northrup, Sergeant for the NHPD; Nicholas Pastore, Chief of the NHPD; Michael Andreucci, retired Lieutenant for the NHPD; and Louis Cavalier, Sergeant for the NHPD and Union President of the NHPD Local Number 530. Witnesses for the defendant were as follows: William Farrell, retired Chief for the NHPD; Maria Bellucci, supervisor of the Workers' Compensation Division of New Haven; Arthur Ferrucci, Police Commissioner for the NHPD; and Sergeant Northrup.

[4]Defense counsel was to provide Exhibit E, which was Dr. Ranieri's curriculum vitae, after trial, but failed to do so (*Tr.* at 170, 171, 173, 175-76).

plaintiff was assigned to the Internal Affairs Unit, where he remained for seven years, investigating complaints against the NHPD and its officers (Tr. at 120-21; Exh. 10). Plaintiff worked side-by-side with full-duty lieutenants in that unit, as he did in other units (Tr. at 130, 105, 156). In April 1983, plaintiff was transferred to the Community Services Division/License Unit, which job did not require "physical exertion or stress," but which did take plaintiff outside NHPD headquarters (Tr. at 12-13, 56-57; Exh. 10).

In April 1984, plaintiff suffered a heart attack and consequently underwent triple bypass surgery (Tr. at 121-22; Exh. 18; Exh. 50 at 4, 26). In September 1985, the Workers' Compensation Commission determined that plaintiff had reached maximum improvement, with a permanent partial disability of sixty-two and one-half percent, for which he received both a lump sum payment and weekly benefits (Tr. at 142-43, 157; *Tr.* at 35-35, 93-94, 96, 97-98).[5] In October 1985, plaintiff returned to work on "light-duty" status, with full-duty pay (Tr. at 122, 151-52; *Tr.* at 35).[6] His physical

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[5]Plaintiff testified that at one point, his treating cardiologist, Dr. Alan Radoff (Exhs. 49, 50 at 3-4), opined that plaintiff's disability was as high as seventy-five percent (Tr. at 149. *See also* Exhs. 17, 50 at 27-31).

[6]The distinction between full-duty and light-duty is not a clear cut one, in that there are no official guidelines distinguishing the two (*Tr.* at 86-88). Former Chief Farrell testified that light-duty was basically inside duties, as opposed to "actual police duties in the street as a police officer." (*Tr.* at 87. *See also Tr.* at 107-08). Plaintiff conceded that at all times since his heart attack, regardless of what assignments he was given, he was considered light-duty status, although assignments given to him also were assumed by full-duty officers as well. (Tr. at 125, 130, 152). Sergeant Northrup testified that plaintiff presently was the only ranking officer who was on light-duty status (*Tr.* at 144). Major Blackmon testified that he was unaware of what plaintiff's status was while plaintiff was under his supervision (Tr. at 55).

Chief Pastore and Sergeant Northrup both testified that during the early 1980's, the NHPD, for financial reasons, preferred to place officers on light-duty in lieu of an early retirement (Tr. at 43; Tr. at 164-65; *Tr.* at 28-31, 49-51). Plaintiff could have been forced into an involuntary retirement under Rule Seventeen (which rarely has been invoked), but such course was put "on hold," pending the outcome of this lawsuit (*Tr.* at 31-32; Tr. at 32-33; *Tr.* at 82-85, 91-92, 103-04, 135, 136-37, *(continued on next page)*

condition never posed a problem in terms of excess absences (Tr. at 55, 131; Tr. at 43-44; *Tr.* at 149). Plaintiff continues his daily regime of exercising fifteen to twenty minutes on an electric treadmill (Tr. at 145-46).

Upon his return, plaintiff's assignments alternated between the Planning Unit and the Training Division (Tr. at 122-23; Exh. 10). In the Planning Unit, he was assigned to review the NHPD's rules and regulations in anticipation of their revision (Tr. at 102-03, 122), and was also heavily involved in a program which identified and assessed vehicles belonging to city residents but which were registered out-of-state (Tr. at 103-04, 122; Exh. 13). In evaluating plaintiff's performance in the Planning Unit for the period April 1986 to April 1987, Major Walter Connor[7] gave plaintiff a rating of forty-nine out of a possible fifty; in his evaluation, Major Connor commented, "After 32 years [on the force], Sgt. Kuntz continues to be a valuable asset to this dept." (Exh. 11).[8]

In the Training Division, despite his "light-duty" status, plaintiff went "out into the field" to conduct background investigations of potential police officers and fire fighters, in the neighborhoods in which such candidates lived (Tr. at 56, 104, 123-24, 141). In conducting such background investigations, plaintiff sometimes worked side-by-side with lieutenants who were full-duty officers (Tr. at 105, 124-25; *Tr.* at 70-71).

In May 1989, plaintiff was assigned to supervise the Crime

140-43, 144-46, 147-48; Exhs. 6, 37; Exh. B at 38-39). Even though plaintiff would receive seventy percent of his annual salary if he were to retire, he is still working because "I enjoy the work. I've always enjoyed it." (Tr. at 144. *See also Tr.* at 36-40, 94-95, 98-101).

[7]Major Connor had twenty-seven years' experience within the NHPD, having progressed through the department as a patrol officer, detective, sergeant, and then major, a position which at that time was immediately subordinate to the Chief; he never served as a lieutenant (Tr. at 8-12, 38-39).

[8]In a similar vein, Major Connor received a letter from the New Haven Department of Assessments, which letter praised plaintiff's efforts in the vehicle assessment program, earning an additional $80,787.00 for the City by adding over $1,100,000 to the City's grand list (Exh. 13; Tr. at 103).

Prevention Unit, at the request of Major Daniel Blackmon,[9] who had been impressed with plaintiff's previous work (Tr. at 14, 125). Plaintiff supervised twenty-two people, including civilians and officers (Tr. at 14-15, 125-26; Exh. 10). Plaintiff testified that this position was "beyond what the standard of control [of a Sergeant] would normally call for." (Tr. at 125). Major Blackmon agreed that in this job, plaintiff assumed some of the major's responsibilities, which certainly was in excess of that usually required of sergeants (Tr. 14-17). As part of that assignment plaintiff assisted with the supervision of the DARE program, in which officers went to schools throughout the city to teach young children the perils of drugs and alcohol, frequently bringing plaintiff outside the department (Tr. at 140-41). In evaluating plaintiff's performance for the period April 1989 to March 1990, Major Blackmon gave plaintiff a rating of forty-seven out of fifty; in his evaluation, Major Blackmon observed, "Sgt. Kuntz is an excellent supervisor. He has been able to solve some long standing problems in the crime prevention unit." (Exh. 12).

In October 1990, plaintiff was transferred to the Communications Unit, where he is presently assigned, supervising eight to ten people in the records and communications area (Tr. at 126-27; Exh. 10). Plaintiff testified that his job requires split-second decision making when an emergency situation, sometimes involving violence, arises; he must decide which personnel to send to the scene, and whether to notify ambulances, emergency services, and/or the fire department (Tr. at 127-28). Plaintiff testified that his present position, while stressful, requires no strenuous physical exertion, but added that virtually none of his assignments, including when he was a sergeant "on the street" required such exertion (Tr. 128-29, 144-45).

Plaintiff testified that he worked approximately two hundred hours in overtime between 1986 and 1988 (Tr. at 146). These hours were spent in the Communications Division,

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[9]Major Blackmon had twenty-four years' service with NHPD; his career path was identical to that of Major Connor, *see* note 7 *supra* (Tr. at 101-02, 110).

doing background investigations, and at the front desk, which is often manned by a lieutenant (Tr. at 146-47; Tr. at 56). Plaintiff testified that on several occasions following his heart attack, he was assigned to maintain control and safeguard the equipment and money at the annual police auctions, at which two or three hundred people gather (Tr. at 147).

This lawsuit arises out of plaintiff's attempts for promotion to lieutenant. In 1986, plaintiff took a written promotional test for such position, and then underwent an oral examination conducted by four high ranking supervisors from outside the New Haven area (Tr. at 131-32). Plaintiff scored fourth hightest on the test, but was actually ranked eighth on the eligibility list because of ties in scoring (Tr. at 132-33; Exh. 14). Plaintiff was notified by letter, dated August 16, 1988, that the NHBPC had voted to approve his promotion to the rank of lieutenant, "effective upon approval of the Board of Finance, successful completion of a medical examination, and assignment by the Chief of Police." (Exhs. 15, 7 §115; Tr. at 133, 152-53, 158; *Tr.* at 111-12).[10] Such medical examination is required by NHPD Rule Thirteen, which provides as follows:

> When a member of the [NHPD] has passed an examination for advancement to a higher rank and is on the eligible list for promotion, he shall be given a thorough examination by the physicians recommended by the Chief of Police and approved by the [NHBPC], before being appointed to the position for which he is eligible. Such appointment shall not be made until after the examining physicians have certified in writing that said member is physically qualified to perform the duties of such advanced rank and is free from any chronic disorders or organic diseases, lesions or impairments likely to interfere with the efficient performance of the duties of such appointee to the

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[10]Although Chief Pastore, former Chief Farrell, Sergeant Northrup, and Commissioner Ferrucci all testified that to their knowledge no officer has ever been promoted who was not full-duty (Tr. at 41; *Tr.* at 55, 82, 91, 103, 105, 119, 120-21; *Tr.* at 34-35, 39), plaintiff was on light-duty status at the time the NHBPC voted to promote him to lieutenant (Tr. at 157).

advanced rank, and report of said doctors shall have been accepted and approved by a majority of the [NHBPC].

(Exh. 5, ¶7; Exh. B, Rule Thirteen ¶7).

On August 23, 1988, plaintiff was examined by Dr. Alfred J. Ranieri, an internist who serves as the police surgeon and chief triage officer for the NHPD (*Tr.* at 72, 113; Exh. D at 4-6); in a letter dated September 12, 1988, to former Chief William Farrell,[11] Dr. Ranieri determined that "[a]t this time, from a medical standpoint, Sgt. Kuntz does appear quite stable and reasonably healthy, and can continue on his present duty status (i.e. sedentary work)." (Exh. 21). He opined, however, that plaintiff was "found [to be] unsuitable, from a medical standpoint, for promotion to the rank of Police Lieutenant," due to plaintiff's 1984 heart attack, his subsequent cardiac bypass surgery, and the "failure of [Dr. Radoff], to unequivocally, clear him for the *full* duties of a Police Lieutenant." (Exh. 21) (emphasis in original).

Eight days later, on September 20, 1988, Dr. Radoff sent former Chief Farrell a brief letter, in which he observed that "Mr. Kuntz continued to do quite well and I see no reason why he should not be able to continue doing these same duties that he has been performing for the last several years." (Exh. 18). Dr. Radoff sent former Chief Farrell another letter, dated October 3, 1988, in which the cardiologist indicated that he had reviewed the duty descriptions of a police lieutenant and opined, "Mr. Walter Kuntz is presently able to perform these duties and has in fact been performing similar duties over the last several years." (Exh. 19). On November 14, 1988, Dr. Ranieri sent another letter to former Chief Farrell, in which Dr. Ranieri emphasized that he would "defer, in part, to Dr. Radoff's judg[]ment since his is Sgt. Kuntz's treating cardiologist." (Exh. 22). Dr. Ranieri cautioned:

I furthermore do maintain however that without unequivocal clearance from this gentlemen's treating

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[11] Former Chief Farrell retired from the NHPD after thirty-six years of service; he served as a patrol officer, detective, sergeant, lieutenant, captain, inspector, assistant chief and chief (*Tr.* at 51-52).

> physicians (i.e. cardiologist and cardic surgeon), that, I personally, will not take the responsibility, from a medical standpoint, for promotional clearance. And, even if cleared by these physicians, let it be known to all, that my judgment is that Sgt. Kuntz continue with only sedintary police work (i.e. *no* street physical contact/stress).

(Exh. 22) (emphasis in original).[12]

Plaintiff testified that at a NHBPC hearing held on July 12, 1989, NHBPC Commissioner Arthur Ferrucci told him that the final "stumbling block" for plaintiff's promotion was Rule Thirteen, and that plaintiff should get a letter from his cardiologist stating that plaintiff met this rule's standards (Tr. at 134-36; *Tr.* at 102; Exh. 30). Fifteen days later, on July 27, 1989, Dr. Radoff wrote a letter, in which he opined that plaintiff "conforms to the requirements as stated in [Rule Thirteen] concerning promotion." (Exh. 20. *See also* Exh. 50 at 5-8). The NHBPC, however, was not convinced by this letter (Tr. at 137; Exhs. 32, 34). At trial, Commissioner Ferrucci testified that the NHBPC generally follows Dr. Ranieri's advice, but that he was not aware of Dr. Ranieri's willingness to defer to Dr. Radoff's opinion, as expressed in Dr. Ranieri's subsequent letter to the NHBPC, dated March 13, 1990 (*Tr.* at 114-16; Exh. 23).[13] He also testified that he was unaware

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[12]It was clear from Dr. Ranieri's deposition that among his concerns was a potential claim made against him if plaintiff were injured while serving as a lieutenant (*See, e.g.*, Exh. D at 20-21 (I've got the biggest lawsuit in the world against me when [plaintiff] goes out in street and dies."), at 26 ("[A]t least I'm not going to take the risk of putting this man in a stressful environment, especially physical stress, have something happen to him, number one, morally I don't want it, and legally I don't want it."). At a later point in his desposition, he referred to one of Dr. Radoff's letters, as "baloney, baloney, baloney..." (Exh. D at 48).

[13]In a letter, dated March 7, 1991, to Chief Pastore, Dr. Ranieri changed his position somewhat:

> Because of my concerns regarding Sgt. Kuntz's status, his extremely stressful state, his elevated systolic blood pressure, and additionally, because the patient had the "understanding" that Dr. Alan Radoff, his cardiologist, categorically *(continued on next page)*

of the Rehabilitation Act and its implications (*Tr.* at 122-23).

Dr. Ranieri found that six other candidates, who were ranked behind plaintiff on the eligibility list, were fit for promotion despite various physical ailments.[14] On September 14, 1989, Sergeant Louis Cavalier, president of the police union and employed by the NHPD since February 1986, wrote a letter to Dr. Ranieri; in mentioning the other candidates with physical ailments who were promoted, he expressed concern that plaintiff had not been treated equally, as the others had not been required to submit the same medical documentation as plaintiff (Exh. 35; Tr. at 208-09; *Tr.* at 42, 43-44, 46). In

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had cleared him for full police duties, I took the liberty to again call Dr. Radoff. I spoke with him at approximately 2:30 p.m. on February 28, 1991. He told me that, indeed, his impression was that the patient's condition had worsened over these past few years, and that a progressive aortic stenosis component was evolving. This is consistent with the patient's cardiac murmurs. Also, quoting Dr. Radoff: "he certainly cannot be a full time officer." Indeed, Dr. Radoff stated to me, that *never* in the past,... has he given clearance for Sgt. Kuntz to resume the complete and full duties of a New Haven police officer, rather, only to continue at a sedentary/limited duty status. We mutually concurred that prognosis for the long term was not good, and that retirement to a sedentary life style, should be seriously considered. Dr. Radoff furthermore advised me, that I was free to quote him in this note.

(Exh. 24)

Dr. Radoff's testimony was to the contrary. While he recalled having made the first three statements attributed to him, he had no recollection of having made the remaining statements (Exh. 50 at 37-41, 49-50).

[14]Three of these candidates were subtantially overweight; in his letters clearing two of them for promotion, Dr. Raneiri strongly advised both of them to lose weight (Exhs. 35, 47A, 48; Tr. at 207-08; Exh. D at 30-35). Rule Fifteen, ¶43 requires that "[a]ll employees [of the NHPD] ... shall adhere to medically accepted standards of physical condition, including weight and endurance standards commensurate with age and other medical factors." (Exh. B; *Tr.* at 48; Tr. at 208). One of these candidates was also to undergo surgery several months after his examination, to have a plate removed from his ankle, requiring an absence from work (Exh. 48; Exh. D at 35-37). Two other candidates were being treated for hypertension, and the last injured his back while on duty, had numerous recurrences, and was on light-duty just prior to being promoted to lieutenant (Exh. 35).

this letter, Sergeant Cavalier requested that Dr. Ranieri either review plaintiff's status or defer to Dr. Radoff's judgment (Exh. 35).[15]

A comparison of the job descriptions of police officer, detective.[16] sergeant, and lieutenant indicates a gradual increase in supervisory matters (Exhs. 1-4). The job description for a police officer places an emphasis on physical activities:

> Work involves responsibility for the protection of life and property, prevention of crime, apprehension of criminals.... Work involves an element of personal danger....
>
> Patrols a designated area of the city...to preserve the peace, prevent criminal operations and enforce traffic regulations....
>
> Responds to assignments and complaints often involving drunkenness, domestic disputes, fires, automobile accidents, and other misdemeanors and felonies;...makes arrests....
>
> [S]erves criminal processes, including warrants, and subpoenas....
>
> May perform...[as] turnkey at the lockup....
>
> Ability to meet the physical requirements established by the city.

(Exh. 4). The job description for lieutenant, in contrast, is replete with supervisory responsibilities:

> This is responsible technical or specialized police

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[15]Dr. Ranieri sent a copy of his letter to former Chief Farrell, dated March 13, 1990, to Sergeant Cavalier (Exh. 23).

[16]There was considerable testimony regarding the responsibilities of a dectective and whether the transition from patrol officer to detective is a "promotion" analogous to the transition from sergeant to lieutenant (*See, e.g.*, Tr. at 29, 30-31, 33, 43-45, 183-86, 196-97, 203-05; *Tr.* at 6-7, 7-8, 11-12, 12-13, 20-21, 22-28, 44, 47-48, 52; Tr. at 57-58; Exhs. 3, 9 Art. XVI §§1-2, 41; Exh. B at 9-10; *Tr.* 45-50, 52-55, 56-58, 103, 135). Sergeant Northrup testified as to accommodations made to detectives who have certain physical constraints (Tr. at 201-03, 205. *See also Tr.* at 58-59, 65-67, 79-80).

The Court need not resolve this issue, in light of the significant other evidence adduced at trial.

work.

Work involves the direction of a watch of the uniformed force on an assigned shift or the command of the activities of a specialized police unit. Work is performed under the general supervision of a superior and is reviewed through conferences, reports, and evaluation of results...

As commanding officer of a watch, inspects equipment and appearance of police officers at roll call; assigns men to posts; reads special orders and gives special instructions; receives and checks all reports and maintains records of activities of officers during tour of duty.

Interviews complainants and takes proper action to dispose of complaints; interviews and questions arrested persons.

Supervises the traffic unit in carrying out an accident investigation and prevention and traffic law enforcement activities; supervises the processing and use of traffic records; and conducts various educational activities in traffic safety.

Assists in the supervision of the criminal investigation and identification activities of the department; assigns cases and investigates serious or difficult cases; interrogates suspects and witnesses, and complainants and takes statements.

Supervises the activities of the department's youth services, communications, records, personnel, or other specialized unit.

Prepares and supervises the preparation of reports relating to activities, and reviews reports prepared by subordinates.

Performs related work as required.

...

Considerable knowledge of the controlling laws and ordinances, particularly the laws of arrest, search and seizure, and evidence.

Considerable knowledge of the rules and regulations of the department.

Considerable knowledge of the geography of the

city.

Considerable knowledge of modern police practices and methods.

Ability to plan, assign and supervise the work of subordinate officers and other personnel.

Ability to deal firmly and courteously with people while respecting their rights and exercising considerable discretion.

Ability to analyze situations quickly and objectively, and to determine proper courses of action to be taken.

Ability to communicate effectively, orally and in writing.

Ability to establish and maintain effective working relationships with fellow employees and the public.

(Exh. 1). Unlike the job description for a police officer, there is no specific mention of danger, thus clearly reflecting that the role of a lieutenant is more supervisory in nature than subordinate roles.

Plaintiff testified that he never encountered any high-end physical stress in his assignments either before or after his heart attack (Tr. at 128-29). Based on his thirty-five years of experience with the NHPD, plaintiff testified that supervisors rarely are involved in high levels of physical stress (Tr. at 129-30, 148). Plaintiff had the opportunity to observe what full-duty lieutenants encounter when he worked side-by-side with several of them; he successfully performed assignments generally given to full-duty lieutenants (Tr. at 125, 130, 155-56. *See also Tr.* at 65, 67-71).

Dr. Radoff testified that plaintiff has done "quite well" and "has been asymptomatic from a cardiac standpoint and has resumed what we would consider relatively normal function for a man of his age." (Exh. 50 at 5). In light of plaintiff's physical condition and medical history, Dr. Radoff advised him to avoid "the high end of exertion...." (Exh. 50 at 6). Dr. Radoff foresaw no difficulties in plaintiff engaging in supervision, management, and administration, in travelling outside NHPD headquarters for investigatory purposes, in making decisions in emergency situations, in monitoring radio transmissions during crises, in preparing reports, and in

participating in policy discussions (Exh. 50 at 6-8, 17-18, 48-49). He opined, however, that plaintiff was unable to pursue and/or apprehend suspects in a dark alley at 3:00 a.m., engage in high-speed chases, hold an unruly crowd back, come face-to-face with an armed individual, or rescue a fellow officer or private citizen (Exh. 50 at 9-13, 15-17, 18-19, 20-25, 52-53). Dr. Radoff added that the chances that plaintiff would suffer any consequences under these stressful circumstances are "[s]tatistically...unlikely," but did raise an "increased risk beyond what [he] would regard as medically acceptable...." (Exh. 50 at 45-46).

Majors Blackmon and Connor, both of whom supervised plaintiff, repeatedly testified that as one's rank increases, that person is less likely to encounter physical confrontations (Tr. at 18, 22, 27, 28-29, 36-38, 53, 64, 107-08, 110). Sergeant Cavalier and Commissioner Ferrucci were in agreement as well (*Tr.* at 42-43, 110). Major Blackmon testified that often times, sergeants and lieutenants have held "the same position doing the same work...." (Tr. at 18). Although some assignments given to lieutenants prove more strenuous than others, Major Blackmon and former Chief Farrell testified that certain positions commonly held by lieutenants are "inside jobs," presenting less exposure to the stresses of the street, such as positions within the Communications Unit, Traffic Division, Internal Affairs, Corporation Counsel's Office, Court Liaison Officer,[17] Records Room, Juvenile Services, Planning Unit, Community Affairs Division, Training Division, Background Investigations and the Front Desk; Major Blackmon opined that none of those jobs required strenuous physical exertion as typical parts of the job (Tr. at 19-24; *Tr.* at 88-90). In fact, Major Blackmon also opined that even when a lieutenant's assignment brings him or her into the street, strenuous physical confrontation is unlikely because:

> You are moving more towards a level of management, filling out details and things like that, but as a shift commander, you are expected to be in the street and if

---

[17]Major Blackmon testified that although this position traditionally is filled by a sergeant, it presently was held by a lieutenant (Tr. at 20).

> some serious incident happened, you are expected to respond. But there again, in most cases, by the time you get there, if there is a major confrontation or situation, it should be calmed down by the time you get there.

(Tr. at 24). He added that it would be "very unlikely" that a lieutenant would be the first to respond to a crime scene (Tr. at 41).

At the time of trial, Lieutenant Michael Andreucci had been a lieutenant for fourteen years, after being a patrol officer and sergeant, for a total of nearly thirty-seven years with the NHPD (*Tr.* at 10-11, 28). Andreucci also had suffered a heart attack, resulting in a twenty-two percent disability (*Tr.* at 11-12). He testified that as a lieutenant, he never had to engage in high end physical exertion or encounter large amounts of stress, although he did say that a police officer never knows what to expect (*Tr.* at 16, 24-27).[18] Lieutenant Andreucci, Commissioner Ferrucci, and Major Blackmon all testified that they were unaware of any incident in which a lieutenant had a physical confrontation (*Tr.* at 17, 24, 29-31, 110-11; Tr. at 51-52).[19] Lieutenant Andreucci worked with plaintiff doing background investigations, an assignment which was equally demanding as that given to lieutenants in terms of stress; in fact, Lieutenant Andreucci testified that plaintiff instructed him how to conduct a background investigation (*Tr.* at 18-19).[20] He also testified that his assignment as liaison to the Corporation Counsel's Office was devoid of stress (*Tr.* at 19-20).

Sergeant Walter Northrup, a personnel officer for the NHPD,[21] was asked to review the assignments given to the

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[18]*See* note 20 *infra.*

[19]On cross-examination, Major Blackmon recalled that at least two lieutenants had been involved in violent incidents, but one such incident occurred while the lieutenant was off-duty (Tr. at 62-64).

[20]While Lieutenant Andreucci and plaintiff were engaged in a background investigation, an alarm went off at a nearby bank, to which they responded, despite plaintiff being on light-duty (*Tr.* at 20-21).

[21]Sergeant Northrup has been with the NHPD twenty-three years (Tr. at 159).

lieutenants who were promoted from the eligibility list on which plaintiff was a candidate; many of those promoted were assigned to inside positions, some of which plaintiff has performed successfully (*Tr.* at 63-65; Exh. 42). For example, Lieutenant Jankowski, who was promoted when plaintiff was passed over, has been in the Records or Communications Unit since his promotion (Tr. at 139; *Tr.* at 56-57; Tr. at 49-50), two assignments which plaintiff has performed. Current Chief Nicholas Pastore[22] testified that lieutenants have been assigned to positions "more traditionally" held by sergeants (*Tr.* at 55-56).

The consensus at trial was that Sergeant Kuntz's performance at the NHPD for the last thirty-five years has been nothing short of outstanding. Major Connor, for whom plaintiff worked when he returned to the force following his heart attack, described plaintiff's work as follows:

> [E]xcellent... He did a tremendous job... Walter was always one of the persons I knew could do a good job and his ability as an organizer, dependability, his sharp intelligence was always his forte, and I think he has great abilities... he would make a fine lieutenant.

(Tr. at 103-04, 108-09). Former Chief Farrell described plaintiff as "an outstanding member of the [NHPD]" and "[e]xcellent... [o]ne of the best." (*Tr.* at 60, 63). When questioned whether plaintiff was still outstanding when he returned from his heart attack, former Chief Farrell stated unequivocally: "Absolutely. Any assignment Sergeant Kuntz received from me he carried out to the utmost of his ability and in most cases it was in an outstanding manner." (*Tr.* at 63).[23]

That sentiment was echoed by Major Blackmon and

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[22]Chief Pastore has had twenty-eight years experience with the NHPD and has served as its Chief for two years (Tr. at 5).

[23]Former Chief Farrell also stated that although the duties that plaintiff performed were necessary, perhaps some, not all, could have been handled by civilians (*Tr.* at 64). However, that point was speculative because no funding was available to hire civilians during that time period (*Tr.* at 64-65).

Commissioner Ferrucci as well. Major Blackmon testified that plaintiff supervised his unit as well as any lieutenant who had handled it previously, and more specifically, found plaintiff dependable, organized, efficient and personable (Tr. at 17). When asked about plaintiff's capability, Major Blackmon testified that plaintiff would be a good lieutenant:

> [Y]ou need to have the skills of consideration, you need to have a clear understanding of how to deploy manpower within the limits of your responsibility. He has demonstrated to me that he can do that... I was more than satisfied with his responsibility to do that.

(Tr. at 34). When asked whether plaintiff's heart attack would hamper his ability to perform as a lieutenant, Major Blackmon responded:

> I don't know what the medical opinion is on his abilities.... All I know is while he worked for me after his heart attack, it never was a question. I mean, it never interfered with him doing the work that was required of him.

(Tr. at 35).[24]

At trial Commissioner Ferrucci testified that if a candidate cannot perform the full duties of a police officer he is not promotable, and that a candidate's status is based on his condition and the doctor's report (*Tr.* at 105-06). The NHBPC makes no distinction, in terms of the different requirements of different ranks, when considering whether a candidate is full-duty (Tr. at 106-07). Commissioner Ferrucci also testified

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[24]Similar testimony was given by John Ambrogio, Chief of Police for the Town of Hamden, who has thirty-six years of police experience (Tr. at 66-67). Hamden does not have a provision equivalent to NHPD's Rule Thirteen, as a result of which officers who have suffered from physical limitations have routinely been promoted (Tr. at 72). In fact, Chief Ambrogio himself was promoted after having had a "severe" heart attack (Tr. at 72-73, 82, 90-92). He felt strongly that injured officers should be accommodated and not terminated or made non-promotable: "It is foolish, in my thinking, to deprive the department and the community of that valuable training and investment and experience simply because one has had a heart attack. I feel very strongly about it." (Tr. at 77). He agreed that as one's rank rises, there is a shift in emphasis from brawn to brains. (Tr. at 79, 97-98).

that there are jobs that plaintiff could perform as a lieutenant and that he knows of no reason why plaintiff could not perform as usefully as a lieutenant as he has as a sergeant except for his medical condition (*Tr.* at 116-18).

Since his appointment, Chief Pastore has been implementing "Community Based Policing" in New Haven, which he described as a modern trend where police officers work more closely with the community through foot patrols and community substations ideally manned by a lieutenant (*Tr.* at 33-37, 53-54). As part of this program, Chief Pastore is attempting to shift "desk responsibilities" to civilian employees and return police officers to traditional police roles, as well as limit the number of light-duty employees (*Tr.* at 33-34, 42-43, 54).[25] Chief Pastore further testified that especially under Community Based Policing, lieutenants must be able to serve in various positions and must be able to be reassigned at any time:

> I believe the administration should have total exposure to every facet of the police business and spend a significant amount of time in those respective roles so that at any given time [ ] they would have, one, an understanding of another officer's responsibilities and functions, and also become knowledgeable about the functions of the respective units and also to keep a sense and understanding of the community that we're obligated to serve.

(*Tr.* at 22. *See also Tr.* at 40). Chief Pastore similarly testified that retaining high level officers such as plaintiff restricts his broad discretion in assignments:

> It severely restricts the administration of the police chief in particular from assigning this unique rank of lieutenant to situations that often lead to stress-making decisions and deployment and supervision of what is referred to as subordinate personnel. It might ultimately lead to police actions and mediating conflict

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[25] Sergeant Northrup testified that since 1989 the number of light-duty employees has dropped by fifty percent, from eighteen to twenty then to eight to nine now (*Tr.* at 137-38, 143-44. *See also Tr.* at 147-48, 149-50).

> and also dealing with the public safety and emergency aspect of this business. We must feel comfortable that we have officers that...are trained or prepared to minimize the flow of adrenalin as much as possible and deal with those eventualities from anything from a city block being burned down by fire or insurrection of the neighborhood. So in that way, we'd have to be very concerned that the officer's physical ability can withstand those types of work.

(*Tr.* at 16-17. *See also* Tr. at 48-50, 52, 111; *Tr.* at 78-79, 128). In addition, it is "within the normal realm of assignments" for a lieutenant to serve as a shift commander or assistant shift commander, who must be prepared to deal with "potentially explosive situations." (Tr. at 17-20, 27-29. *See also* Tr. at 24, 46-48, 150-51; *Tr.* at 22-23, 25-26, 80-81, 109).[26] Chief Pastore commented that in an ideal world, the NHPD could accommodate officers with disabilities, but that there are "practical" constraints, including budgetary ones and potential civil liability (*Tr.* at 38-39). Chief Pastore also testified as to the significant efforts he has made in expanding the number of African-American, Hispanic, and female police officers and higher-ranked officers. (Tr. at 23-27).

Chief Pastore, former Chief Farrell, Lieutenant Andreucci, and Commissioner Ferrucci all expressed concern that placing plaintiff in stressful and dangerous situations could cause further damage to plaintiff's heart and could jeopardize fellow officers and the community (*Tr.* at 16-17; Tr. at 85-86, 24-26, 107, 121).

Plaintiff has twice been bypassed for promotion (Tr. at 138-39), and remains a sergeant today. At Chief Pastore's request, the number of budgeted lieutenant positions was increased from twelve to eighteen, five of which remain vacant (Tr. at 160; *Tr.* at 12, 40; Tr. at 29, 41; *Tr.* at 144).

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[26] Plaintiff testified that he was able to perform the functions of a shift commander, as that job is mostly "administrative." (Tr. at 156-57).

Sergeant Northrup also listed a number of activities plaintiff could not perform, including commanding a SWAT team, and commanding the street crime unit, serving warrants, commanding patrol units in the street (*Tr.* at 151-53).

Chief Pastore testified that the current vacancies create problems in terms of assignments (Tr. at 42), and no eligibility list exists from which the NHBPC could fill those vacancies (*Tr.* at 15-16).[27]

In October 1989, plaintiff filed a complaint with the Connecticut Commission on Human Rights and Opportunities ["CCHRO"] against the NHBPC, which complaint alleged that he was unlawfully discriminated against on the basis of his age and handicap (Tr. at 140; Exhs. 38-39). CCHRO, however, did not decide the merits of plaintiff's case because he failed to file his complaint within the 180-day statute of limitations (Tr. at 154).

II. CONCLUSIONS OF LAW

The following constitutes the Court's conclusions of law, pursuant to Fed. R. Civ. P. 52(a):

A. LIABILITY

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides in pertinent part:

> No otherwise qualified individual with handicaps... shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

1. PLAINTIFF'S PRIMA FACIE CASE

In a discrimination case under §504, the burden of proof is initially upon the plaintiff to establish a *prima facie* case of unlawful discrimination by proving that: (1) he is a handicapped person within the meaning of the Act; (2) he is otherwise qualified for the position; (3) he was excluded or discharged from the position solely by reason of his handicap;

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[27]To create an eligibility list, the NHPD requests the Department of Civil Service to conduct an examination; once the exam is conducted, the Service would issue a list of candidates, from which the department could make promotions; this process can encounter delays and take a "considerable length of time." (Tr. at 16-17; Tr. at 51-52). However, these positions could be filled by a process called "underfilling," whereby lesser ranked officers essentially perform a lieutenant's functions (*Tr.* at 13-16; Tr. at 31-32).

and (4) the position was part of a program supported by federal funds. *See Cushing v. Moore*, 970 F.2d 1103, 1107 (2d Cir. 1992); *Guice-Mills v. Derwinski*, 967 F.2d 794, 797 (2d Cir. 1992); *Gilbert v. Frank*, 949 F.2d 637, 640 (2d Cir. 1991); *Doe v. New York University*, 666 F.2d 761, 774-76 (2d Cir. 1981); *Sedor v. Frank*, 756 F. Supp. 684, 686 (D. Conn. 1991). There is no dispute that plaintiff is handicapped, that plaintiff was denied a promotion solely because of his handicap, and that the NHPD and the City receive federal funding (Exh. 42, at 2-3).[28] Thus, the sole dispute is whether plaintiff was "otherwise qualified" for the position of lieutenant.

Once a plaintiff-employee has established a *prima facie* case of discrimination, the burden of proof shifts to the defendant-employer to rebut the inference that the handicap was improperly taken into account, by demonstrating that the handicap is relevant to the job qualifications. *Teahan v. Metro-North Commuter Railroad*, 951 F.2d 511, 515 (2d Cir. 1991), *cert denied*, 113 S. Ct 54 (1992; *Doe, supra*, 666 F.2d at 776-77; *Sedor, supra*, 756 F. Supp. at 686. Plaintiff then bears the final burden of proving that he is qualified despite his handicap. *Teahan, supra*, 951 F.2d at 515; *Doe, supra*, 666 F.2d at 776-77.

The phrase "otherwise qualified" is not defined within the Act. *Gilbert, supra*, 949 F.2d at 641. In *Gilbert*, the Second Circuit recently addressed the parties' respective burdens on this issue as follows:

> Since a plaintiff must show that she or he was "otherwise qualified" as part of the prima facie case, and since that term has been defined to include the concept of "reasonable accommodation," a plaintiff must, in order to make out a prima facie case, show that she or he can perform the essential functions of the job in spite of the handicap either (a) with no need

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[28]On p.3 of this exhibit, defendants cautioned, "Whether monies received by the [NHPD] (or the City) make the [NHPD] subject to Section 504 of the Rehabilitation Act is for the Court to decide. The defendants do not concede that such monies do make the [NHPD] subject to that statute." However, in their post-trial brief (Dkt. #59), defendants make no such argument.

> for accommodation, or (b) within a reasonable accommodation. We do not view the plaintiff's burden with respect to the latter alternative as a heavy one. We would deem it sufficient on this issue for the plaintiff to present evidence as to her or his individual capabilities and suggestions for some reasonable assistance or job modification by the employer. This permits the court to make an individualized inquiry into whether the plaintiff is otherwise qualified for the job in question. It must be noted, however, that though "reasonable accommodation" may include such adjustments as modification of physical facilities, work schedules, or equipment, or some job restructuring, "reasonable accommodation" does not mean elimination of any of the job's essential functions.
>
> Once the plaintiff has made a prima facie case that she or he is otherwise qualified by showing the ability to perform the essential functions of the job with some reasonable accommodation, the burden shifts to the employer to show that no reasonable accommodation is possible. Indeed, in light of the goals of the Rehabilitation Act and the greater access of the employer to information regarding the feasibility of various possible job modifications, the employer is given the ultimate burden of proof on the issue of reasonable accommodation.

Id. at 642 (citations omitted).

As *Gilbert* explains, a two-part analysis is necessary to determine whether plaintiff is "otherwise qualified." First, a court must determine the essential functions of the job and second, it must consider whether plaintiff can perform those essential functions, with reasonable accommodation if necessary. *See also Hall v. United States Postal Service,* 857 F.2d 1073, 1078 (6th Cir. 1988) ("It is evident from a review of the case law in this area that the 'otherwise qualified' inquiry requires a consideration not only of the handicapped applicant's ability to perform the job's essential function, but also whether a reasonable accommodation by the employer would enable the handicapped person to perform those functions.") (citations omitted); *Dexler v. Tisch,* 660 F. Supp.

1418, 1427 (D. Conn. 1987).

As the United States Supreme Court observed in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287, *reh. denied*, 481 U.S. 1024 (1987) ["*Arline*"]:

> To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if §504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

See also Wynne v. Tufts University School of Medicine, 932 F.2d 19, 24-25 (1st Cir. 1991) *(citing Arline), on remand*, Civ. No. 88-1105-Z, 1992 U.S. Dist. LEXIS 2629 (D. Mass. Mar. 2, 1992), *aff'd*, 976 F.2d 791 (1st Cir. 1992).

a. "ESSENTIAL FUNCTIONS"

The court in *Hall, supra*, expanded upon *Arline* as follows:

> As the court stated in *Arline*, the determination of whether physical qualifications are essential functions of a job requires the court in engage in a highly *fact-specific* inquiry. Such a determination should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved.

857 F.2d at 1079 (emphasis in original) *(citing Arline).*[29]

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[29]The plaintiff in *Hall* had suffered orthopedic injuries during her employment as a letter carrier for the United States Postal Service ["USPS"]; her request for reinstatement as a distribution clerk was denied because she admittedly could not comply with the requirements of the job description, which included lifting up to seventy pounds, kneeling, and repeated bending. The Sixth Circuit reversed the district court's granting of summary judgement in defendant's favor, as there was "a legitimate factual dispute as to whether the seventy-pound lifting requirement was indeed essential." *Id.* Plaintiff had averred in her affidavit that during her tenure as a distribution clerk, she had never lifted seventy pounds, nor had she observed other employees doing that; *(continued on next page)*

A similar approach was taken in *Ackerman v. Western Electric Co.*, 643 F. Supp. 836 (N.D. Cal. 1986), *aff'd*, 860 F.2d 1514 (9th Cir. 1988), with respect to a California statute virtually identical to and construed in the same fashion as the Rehabilitation Act. *Id.* at 843. There the plaintiff-employee developed a bronchial condition which made heavy exertion and exposure to dust dangerous for her. The defendant-employer, a telecommunications equipment installation company, terminated her employment on the ground that iron work and cabling were "essential functions" of her job and that exposure to dust and heavy exertion were unaviodable in the performance of those functions. In ruling for the plaintiff, the trial court emphasized that according to plaintiff's time sheets, 74% of plaintiff's time was spent on basic and complex wiring, which posed no risk to her, and only 9% and 2.5% were spent on cabling and iron work, respectively. *Id.* at 845-46. The court thus concluded that the cabling and iron work were "proportionately so insignificant that [they] cannot be considered as an essential function of her position." *Id.* at 846.

The parties' views regarding the "essential functions" of a NHPD police lieutenant differ dramatically, with plaintiff emphasizing the administrative aspects of lieutenant work and defendants stressing the potentially dangerous and strenuous components of it. As plaintiff testified, in the various sergeant jobs he has assumed, he has never engaged in "high end" physical exertion or stress, although his present position in the Communications Unit is stressful, in that he must make instantaneous decisions in life-and-death matters. There was ample evidence that to some extent, sergeants and lieutenants are largely inchangeable within the NHPD. For

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the USPS did not seriously contest these factual assertions. *Id.* Thus, summary judgment on this issue was inappropriate.

This seventy-pound requirement was also at issue in *Gilbert, supra*, in which the district court accepted the testimony of defendant's expert doctors that plaintiff-USPS employee, with a kidney disease, was unable to lift such amount, which factual finding was not disturbed on appeal. 949 F. 2d at 642-44.

example, Chief Pastore and Major Blackmon both testified that lieutenants have been assigned positions "more traditionally" held by sergeants. The Front Desk, to which the plaintiff has been assigned, often is manned by a lieutenant; as Major Blackmon testified, the Court Liaison Officer position is traditionally held by a sergeant, although it presently was being held by a lieutenant. In many of his assignments, plaintiff has worked side-by-side with lieutenants, doing the exact same work as that of the higher-ranking officer; in fact, plaintiff and Major Blackmon both testified that in the Crime Prevention Unit, plaintiff even assumed some of the Major's responsibilities.

Seven witnesses — plaintiff, Major Blackmon, Major Connor, Lieutenant Andreucci, Commissioner Ferrucci, Sergeant Cavalier, and Hamden Chief Ambrogio — all agreed that as an officer's rank increases, he or she is less likely to engage in physical exertion or stress. This conclusion has particular significance in the transition from sergeant to lieutenant. Former Chief Farrell and Major Blackmon provided a lengthy list of "inside jobs" held by lieutenants — Communications Unit, Traffic Division, Internal Affairs, Corporation Counsel's Office, Court Liason Officer, Records Room, Juvenile Services, Planning Unit, Community Affairs Division, Training Division, Background Investigations, and the Front Desk. Major Blackmon, Lieutenant Andreucci, and Commissioner Ferrucci were unable to recall any incidents in which a lieutenant became involved in physical conflicts. Thus, there was an abundance of testimony to support plaintiff's contention that a lieutenant's responsibilities are primarily supervisory and administrative in nature.

However, there also was testimony by Chief Pastore, former Chief Farrell, Major Blackmon, Lieutenant Andreucci, and Commissioner Ferrucci that lieutenants can be assigned as shift commanders or assistant shift commanders, who, from time-to-time, need to engage in high-speed automobile chases, apprehend suspects, or interview witnesses on the scene. Through his innovative Community Based Policing, Chief Pastore has attempted to shift from the policy begun in the early 1980's to place officers on light-duty in lieu of early retirement towards a system whereby "desk responsibilities" are assumed by civilian employees so that police officers can

assume more traditional police roles, including foot patrol. Through his efforts, the number of light-duty officers is now half of what is was in 1989, down to eight or nine.

As the court held in *Hall, supra*, a court should look at the "actual functioning and circumstances of the particular enterprise involved." 857 F.2d at 1079. In the instant case, the testimony was overwhelming that the "actual functioning" of a NHPD lieutenant entails far more "inside" responsibilities than "outside" duties, even under the newly instituted Community Based Policing. As in *Ackerman, supra*, the physically strenuous aspects of a lieutenant's position are "proportionately so insignificant that [they] cannot be considered as an essential function of [his] position." 643 F. Supp. at 846.

This finding thus differs from the ultimate conclusions reached in *Simon v. St. Louis County*, 497 F. Supp. 141, 143-147, 150-51 (E.D. Mo. 1980) ["Simon I"], *rev'd in relevant part*, 656 F.2d 316, 319-21 (8th Cir. 1981) ["Simon II"], *cert denied*, 455 U.S. 976 (1982), *on remand*, 563 F. Supp. 76 (E.D. Mo. 1983) ["Simon III"], *aff'd*, 735 F.2d 1082 (8th Cir. 1984) ["Simon IV"]. There the plaintiff was a police officer, with over two years' experience, who was shot in the line of duty, rendering him a paraplegic; he was unable to ambulate without leg braces and crutches, and could only operate a specially fitted automobile. *Simon I, supra*, 497 F. Supp. at 143-44. Several months later, the plaintiff was terminated, as he could not run, jump, hop, stoop, turn, pivot or perform similar movements quickly and without the aid of another person or supporting device, as required by department regulations. *Id.* at 143-4. At trial the plaintiff introduced evidence regarding the myriad "desk jobs" which he could perform. *Id.* at 146. The trial court ruled in defendant's favor on this issue, in that the plaintiff could not fulfill both "the responsibility of a commissioned officer to effect a forcible arrest and aid in disaster emergency relief if necessary...," with which the plaintiff did not disagree, and "[the] role as a commissioned officer to be transferred through a number of bureaus to become competent at a variety of functions." *Id.* at 146, 151.

The Eighth Circuit reversed the trial court on this issue, in that there had been insuffucuent evidence on whether these

requirements, *i.e.*, the ability to effect a forcible arrest and render emergency aid and to be freely transferred to all positions within the police department, were necessary and legitimate requirements of the job." *Simon II, supra*, 656 F.2d at 320. Plaintiff had presented evidence at trial that at least three other injured police officers remained as commissioned police officers despite their inability to satisfy these requirements. *Id.* at 321 nn.8-9. The appellate court thus remanded the matter back to the district court for the following reconsideration:

> On remand, the district court should consider whether the[se] requirements for police officers...are reasonable, legitimate, and necessary requirements for all positions within the department. The district court should determine whether the ability to make a forceful arrest and the ability to perform all of the duties of all of the positions within the department are in fact uniformly required of all officers. If not uniformly required, they should not be considered actual requirements for all positions. Also, consideration should be given to [plaintiff's] actual physical condition in combination with [plaintiff's] police experience, and further determinations made as to exactly what functions within the department he has the physical abilities to perform.

Id. at 321.

A second trial was held upon remand, at which defendant conceded that "a significant portion of the department's commissioned officers do not make forceful arrests on a daily basis." *Simon III, supra*, 563 F. Supp. at 79. The court discounted plaintiff's resort to the other injured police officers, whose impairments were "far less severe than plaintiff's" so that the court found that the forceful arrest policy was uniformly applied by the defendant to its active commissioned officers. *Id.* at 78. Moreover, defendants presented "highly qualified expert testimony that the forceful arrest policy was a nationwide standard that is reasonable, legitimate, and necessary," as well as expert testimony concerning the need for the department's "free transferability requirement." *Id.* at 79, 80. In light of this convincing testimony, the trial court was "unwilling to second guess the decisions of those infinitely better versed in the intricacies of personnel planning,

municipal finance, and law enforcement techniques" and "decline[d] to substitute its judgment for that of those who have set the staffing requirements for the department." *Id.* at 79, 80.[30]

The facts in *Simon* are markedly different from those presented here. First, the plaintiff in *Simon* was unable to perform even the most basic functions of a police officer; in contrast here, plaintiff has performed, and is continuing to perform, virtually all activities, except for "high end" physical exertion. Second, the unfortunate plaintiff in *Simon* had less than three years' experience as a police officer, while plaintiff Kuntz has been with the NHPD for more than thirty-five years. In terms of transferability, there is little question that plaintiff's skills are far more transferable than those of the plaintiff in *Simon*. Third, as a high-ranking officer, as discussed in greater detail *supra*, the likelihood of plaintiff Kuntz having to engage in strenuous physical exertion is significantly less than that of a second- year patrol officer. And last, unlike *Simon*, plaintiff presented evidence of other officers either remaining as lieutenants or having been promoted to lieutenant, despite disabilities which were not "far less severe" than plaintiff's cardiac condition.

Consequently, the court finds that the "essential functions" of the position of lieutenant in the NHPD are overwhelmingly, if not exclusively, supervisory in nature.

b. PLAINTIFF'S PERFORMANCE OF "ESSENTIAL FUNCTIONS"

The parties similarly disagree whether plaintiff can assume these essential functions, with reasonable accomodations if necessary. As plaintiff, Dr. Radoff, Chief Pastore, and Sergeant

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[30]The Eighth Circuit reluctantly affirmed this decision:

> Nevertheless, after carefully reviewing the record here we cannot say that the district court's findings that the forceful arrest and transfer requirements were in fact necessary to the job and uniformly applied were clearly erroneous. The district court dutifully followed the dictates of this court's mandate and based its findings on adequate evidentiary support. It is not our function to reevaluate the evidence and to substitute our judgment for the court's.

Simon IV, supra, 735 F.2d at 1085.

Northrup all testified, plaintiff has not had a reoccurrence since his heart attack and has experienced no difficulties with absenteeism. He adheres to a daily regimen of exercising fifteen to twenty minutes on an electric treadmill. His cardiac condition did not prevent him from putting in approximately two hundred hours of overtime from 1986 to 1988. Despite his light-duty status, while in the Training Division, he conducted background investigations in various neighborhoods throughout New Haven. During one such investigation, both he and Lieutenant Andreucci, who also had suffered a heart attack, were the first to respond to a bank alarm. As previously mentioned, not only has plaintiff assumed lieutenant responsibilities, but at one point, Major Blackmon assigned him Major-level matters as well. Majors Blackmon and Connor both opined that plaintiff would be a fine lieutenant. Doctors Ranieri and Radoff were both of the opinion that plaintiff's cardiac history posed no obstacle to plaintiff continuing in an administrative capacity.

Given that plaintiff has engaged in no "high end" physical exertion as a sergeant, he is certainly less likely to encounter such incidents as a lieutenant. Even so, plaintiff expressed confidence in his ability to perform as a shift commander. The medical evidence of this issue was ambivalent, at best. In late 1988, Dr. Ranieri initially found that plaintiff was "unsuitable, from a medical standpoint, for promotion to the rank of police Lieutenant," but then on two later occasions indicated that he was willing to defer to Dr. Radoff's judgment. More than two years later, he returned to his orignial position, attributing conclusions to Dr. Radoff that the cardiologist could not recall.[31]

During 1988 and 1989, Dr. Radoff opined that plaintiff "conform[ed] to the requirements as stated in [Rule Thirteen] concerning promotion." In early 1991 and early 1992, Dr. Radoff expressed concern that plaintiff could not perform "the complete and full duties of a New Haven *police officer*"

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[31] As previously noted, *see* note 12 *supra* and accompanying text, among Dr. Ranieri's concerns was the possibility of a law suit brought against him if plaintiff were injured on the job.

(emphasis added), such as chasing and tackling a suspect in a dark alley at 3:00 a.m., engaging in high-speed chases, holding back an unruly crowd, coming face-to-face with an armed individual, or rescuing a fellow officer or private citizen. Dr. Radoff's concerns, however, were "[s]tatistically... unlikely," but did raise an "increased risk beyond what [he] would regard as medically acceptable...."

Thus, plaintiff has easily met his burden of establishing his *prima facie* case.

2. "REASONABLE ACCOMMODATION"/ DEFENDANTS' REBUTTAL

The determination with respect to reasonable accommodation, "like the essential function determination, is highly fact-specific and requires the court to engage in an individualized inquiry to ensure that the employer's justifications 'reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives...'" *Hall, supra* 857 F.2d at 1080 *(citing Arline).* As previously indicated, "reasonable accommodation" does not mean elimination of any of the job's essential functions. *Gilbert, supra,* 949 F.2d at 642; *Hall, supra,* 857 F.2d at 1078. Minor readjustments which do not create an undue hardship to the employer are deemed "reasonable." *See, e.g., Guice-Mills, supra,* 967 F.2d at 798 (offering emotionally disabled Head Nurse a position as staff nurse with her requested hours and no reduction in renumeration is "'reasonable accommodation' virtually as a matter of law"); *Ackerman, supra,* 643 F. Supp. at 847-48 (allowing plaintiff to wear a simple paper mask, with a minor reassignment of job duties to lessen lifting requirements was "reasonable accommodation").

The "reasonable accommodation" sought by plaintiff here is assignment to one of many lieutenant jobs, previously enumerated, which does not entail physical exertion. As previously indicated, defendants contend that lieutenants must be able to serve in various positions, subject to reassignment at any time; this flexibility is especially critical under Community Based Policing. The district court in *Ackerman, supra,* described a defendant-employer's burden with respect to "undue burden" as follows: "The burden is on the [defendant] to come forward with evidence showing that

the accommodation sought is either unduly costly or burdensome or would so restructure the position that essential functions would have to be performed by others." 643 F. Supp. at 851. The Second Circuit recently found that requiring a Veteran's Administration Hospital to function without a Head Nurse would constitute an "undue hardship" to the defendant. *Gucie-Mills, supra,* 967 F.2d at 797-98.

The same is not true here. Plaintiff has served the NHPD for approximately thirty-five years, in a variety of assignments, which he has handled with distinction. It is unimaginable that the NHPD could not find a position for him to fill as lieutenant, particularly when there is so much overlap in the responsibilities filled by lieutenants and sergeants, and where he already has satisfied the demands of a lieutenant's job, and at one point, a major's job. As previously mentioned, other officers with disabilities, including Lieutenant Andreucci, who has a heart condition, have served as lieutenants, without any serious disruption to the NHPD's operations. Given that there are eighteen authorized lieutenant spots, albeit some unfilled, there will not be any gaps created by plaintiff's promotion to lieutenant, as in *Guicie-Mill, supra.* Defendants place great emphasis on plaintiff's inability to assume the full responsibilities of shift commander or assistant shift commander, for which there is some remote possibility that the commander engage in a high-speed chase, restrain unruly crowds, or pursue and apprehend suspects at 3:00 a.m. in a dark alley. With all deference to the higher-ranking NHPD officers who testified in court, this judicial officer is not at all confident that *any* of them could accomplish themselves, if called upon, the task of apprehending a drug addict with a loaded gun in a dark alley at 3:00 a.m.

Defendants also have argued that this promotion would pose a danger to plaintiff himself, to other police officers, and to the public in general. Questions of safety are legitimate concerns for an employer, *see, e.g., Mantolete v. Bolger,* 767 F.2d 1416, 1422-23 (9th Cir. 1985), *recon. denied on other grounds,* 791 F.2d 784 (9th Cir. 1986); *Dexler, supra,* 660 F. Supp. at 1428, particularly where "public safety concerns" are raised, as in *Teahan, supra,* 951 F.2d at 521, where the disabled employee was a railroad maintenance worker. Just

like the issue of "undue hardship," a defendant-employer bears a significant burden on this issue as well: "The safety defense has been given a narrow scope. It must be tailored to the individual characteristics of the employee in relation to specific, legitimate job requirements. The risk of injury to the employee must be imminent and substantial, and the mere possibility of future injury is not sufficient." *Ackerman, supra*, 643 F. Supp. at 848 (citations omitted).

For the same reasons as stated above, defendants have not sustained their burden in proving that the risk of injury to plaintiff, to fellow officers, and to the public is "imminent and substantial," rising above the level of a "mere possibliity." Dr. Radoff opined that the risk of injury to plaintiff was "increased... beyond what [he] would regard as medically acceptable..., but that such injury was also "[s]tatistically... unlikely." That risk is decreased even more significantly when one considers, based upon the testimony of several high-ranking NHPD officials, that lieutenants rarely engage in any strenuous or violent activity.

Thus, defendants have not rebutted the inference that plaintiff's handicap was improperly taken into account in denying him his promotion to the rank of lieutenant. In reaching this conclusion, the court is in no way demeaning the significant efforts of Chief Pastore in trying to eliminate "dead wood" from within the ranks of the NHPD, and in returning police officers to traditional police activities, such as foot patrols. He has been successful in halving the number of light-duty officers, to just eight or nine at the present time. Chief Pastore similarly is to be commended for the significant efforts he has made in opening higher ranks to African-American, Hispanic, and female officers. However, under the unique circumstances of this case, involving a sergeant with a long, varied and exemplary record, who essentially has performed lieutenant-level work and beyond, about whom there is agreement that he would make a fine lieutenant, who has been "on the streets" in investigative background work and who was the first to respond to a bank alarm, who makes stressful life-and-death decisions in his present position, who exercises daily and has had no absenteeism, and for whom there is only a remote chance that he would be called upon

to engage in strenuous physical activity, in a police department with several lieutenants who have physical disabilities, including coronary ones, the Court must find that plaintiff has satisfied all his burdens under §504 of the Rehabilitation Act.

B. REMEDIES

The law is well-established that sucessful Rehabilitation Act plaintiffs are entitled to reinstatement with or without back pay and other equitable relief, including recovery of fringe benefits or similar entitlements. *See, e.g., Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630-31 (1984); *Eastman v. Virginia Polytechnic Institute*, 939 F.2d 204, 206 (4th Cir. 1991); *Lengen v. Department of Transportation*, 903 F.2d1464, 1468 (11th Cir. 1990); *Kent by Gillespie v. Derwinski*, 790 Supp. 1032, 1041-42 (E.D. Wash. 1991); *Rivera Flores v. Puerto Rico Telephone Co.*, 776 F. Supp. 61, 63, 71 (D.P.R. 1991); *Doe v. Southeastern University*, 732 F. Supp. 7, 9 (D.D.C. 1990), *app. dismissed mem.*, 927 F.2d 1257 (D.C. Cir. 1991).

Although the law is less settled, most recent decisions have held that plaintiffs prevailing under §504 may not recover compensatory damages for emotional distress or pain and suffering, *see, e.g., Eastman, supra*, 939 F.2d at 206-09; *Lengen, supra*, 903 F.2d at 1468; *Rivera v. Flores, supra*, 776 F. Supp. at 62-71; *Americans Disabled for Accessible Public Transportation v. Skywest Airlines, Inc.*, 762 F. Supp. 320, 325 (D. Utah 1991) ["ADAPT"]; *Doe, supra*, 732 F. Supp. at 9-10; *Rhodes v. Charter Hospital*, 730 F. Supp. 1383, 1384-86 (S.D. Miss. 1989); nor may they recover punitive damages, *Eastman, supra*, 939 F.2d at 209; *Lengen, supra*, 903 F.2d at 1468; *ADAPT, supra*, 762 F. Supp. at 325; *Doe, supra*, 732 F. Supp. at 9-10. *But see Tanberg v. Weld County Sherriff*, 787 F. Supp. 970, 972-73 (D. Colo. 1992) (permitting terminally ill plaintiff to sue for "compensatory damages" under §504 after being terminated from position as volunteer reserve deputy sheriff, where reinstatement was not feasible due to his deteriorating condition from AIDS, but without specifying what those "compensatory damages" encompass).

Accordingly, plaintiff is entitled to a permanent injunction, promoting him to the position of a lieutenant. He is further entitled to back pay from September 1988 to the present, for the differential between a lieutenant's pay and that of a sergeant.

The only evidence at trial with respect to that aspect of damages was Exh. 9, which indicated the pay rates for both positions for the periods July 1, 1988 to June 30, 1989, from July 1, 1989 to June 30, 1990, and from July 1, 1990 forward (*see also* Dkt.#61, at 27-28). Plaintiff's lost wages are calculated as follows:

TIME PERIOD	NUMBER OF WEEKS (1)	WEEKLY PAY DIFFEREN-TIAL (2)	LOST PAY ((1) x (2))
9/15/88 - 6/30/89	41	$ 74.54	$ 3,056.14
7/1/89 - 6/30/90	52	$ 80.49	$ 4,185.48
7/1/90 - 3/5/93	140	$ 86.96	$12,174.40
		TOTAL	**$19,416.02**

To the extent plaintiff seeks attorneys' fees, *see, Kent, supra,* 790 F. Supp. at 1042; *Rivera Flores, supra,* 776 F. Supp. at 71; *James v. Frank,* 772 F. Supp. 984, 998-1004 (S.D. Ohio 1991), plaintiff shall file his application, brief, affidavit(s) and other supporting doccumentation on or before *March 26, 1993;* defendants shall file their brief in opposition and other supporting documentation on or before *April 16, 1993;* and plaintiff may file reply brief, if any, on or before *April 30, 1993.*[32]

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[32]Prior to and during the trial, plaintiff dropped his Second Claim, for political discrimination (Tr. at 167-68).

On August 17, 1992, seven months after the completion of trial, plaintiff filed a motion to amend his complaint (Dkt. ##65-66), to add a count under the Americans with Disabilities Act[ADA], 42 U.S.C. §12, 101. On September 22-23, 1992, defendants filed their opposition to such motion (Dkt. ##71-73). Through a clerical error, the original of such motion was directed to the district judge to whom this file originally had been assigned; the district judge on September 25, 1992 *(continued on next page)*

III. CONCLUSION

Accordingly, judgment shall enter for plaintiff in the amount of $19,416.02, with attorneys' fees and costs as are determined at a later time, and a permanent injunction shall enter under which defendants shall promote plaintiff to the rank of lieutenant.

Dated at Bridgeport, Connecticut, this 3rd day of March, 1993.

Joan Glazer Margolis
U.S. Magistrate Judge

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granted the motion, under the liberal standards of *Foman v. Davis*, 371 U.S. 178, 182 (1962), permitting defendants to renew [their] opposition by appropriate response to the amended pleading after it has been filed." According to the court's computerized docketing system, the first amended complaint was filed on September 25, 1992 (Dkt #74), although such filing is not fully reflected on the cover sheet of such pleading.

In his brief, plaintiff acknowledges that the standards under the ADA are the "same" as those under the Rehabilitation Act (Dkt. #66 at 2-3). *Cf. Rivera Flores, supra*, 776 F. Supp. at 69 (comparing §504 to ADA). In that plaintiff has been granted relief under the Rehabilitation Act, there is no need to address any claims he may have under the ADA.

In the United States District Court for the District of Connecticut

Walter Kuntz v. City of New Haven, et al.	Civil No. N-90-480 (JGM)

JUDGMENT

This action came on for trial before the Honorable Joan G. Margolis, United States Magistrate Judge, and the issues having been duly tried and the Court having rendered its Memorandum of Decision and its Findings of Fact and Conclusions of Law,

It is therefore ORDERED and ADJUDGED that judgment be and is hereby entered in favor of the plaintiff in the amount of $19,416.02, with attorneys' fees and costs as are determined at a later time, and a permanent injunction shall enter under which defendants shall promote plaintiff to the rank of lieutenant.

Dated at Bridgeport, Connecticut this 10th day of March, 1993.

KEVIN F. ROWE, Clerk

By /s/Carol E. Cannady
Carol E. Cannady
Deputy in Charge

In the United States District Court for the District of Connecticut

Walter Kuntz	3:90CV00480 (JGM)
v.	
City of New Haven, et al.	Date: June 18, 1993

RULING ON POST-JUDGMENT MOTIONS

Familiarity is presumed with this Magistrate Judge's forty-three page Memorandum of Decision, filed March 3, 1993 (Dkt. #76), which entered judgment in plaintiff's favor on his claim under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 in the amount of $19,416.02 for lost wages from September 1988 to March 1993, entered a permanent injunction promoting plaintiff from the rank of sergeant to lieutenant, awarded attorney's fees, but denied compensatory damages for emotional distress or pain and suffering. Judgment was entered accordingly on March 10, 1993 (Dkt. #77).

Three post-judgment motions are presently pending before the Court. First, on March 24, 1993, defendants filed a motion for reconsideration and to amend to reduce the amount of damages (Dkt. ##80 & 82). Plaintiff filed his brief in opposition on April 12, 1993 (Dkt. #89). On June 14, 1993, the parties filed a five-paragraph Stipulation, with respect to facts which transpired after the close of trial. (Dkt. #97) ["Stip."].[1]

Second, on March 24, 1993, plaintiff also filed a motion for reconsideration (Dkt. #81), with respect to the Court's denial of compensatory damages for emotional distress or pain and suffering. On April 21, 1993, defendants filed their brief in opposition (Dkt. #93).

And last, on March 26, 1993, plaintiff filed an application for attorney's fees, brief, and affidavits in support (Dkt.

[1] Various computer printouts were attached to the Stipulation.

##83-87).[2] On April 21, 1993, defendants filed their brief in opposition (Dkt. #92). Plaintiff filed a reply brief and additional documentation on April 28, 1993 (Dkt. ##94-95).

For the reasons stated below, defendants' motion for reconsideration on the issue of damages is *denied*, plaintiff's motion for reconsideration is *granted* in the amount of $500.00, and plaintiff's application for attorney's fees is *granted* in the amount of $44,790 and $3,775.95 in costs, for a total of $48,565.95.

I. DISCUSSION

Plaintiff was placed on injured status as of November 25, 1992 and remained on that status until his death on May 8, 1993 (Stip. ¶1; *see also Dkt. #96).* Plaintiff's pay on injured status was the same as if he had been working (Stip. ¶2). A new police contract was ratified on June 23, 1992; under the new pay levels, the award for back pay through March 5, 1993 would be increased by $415.50 (*id.* ¶3). Damages accordingly would be as follows:

TIME PERIOD (WEEK ENDING)	NUMBER OF WEEKS (1)	WEEKLY PAY DIFFEREN-TIAL (2)	LOST PAY ((1) x (2))
9/15/88 - 6/29/89	42	$ 74.54	$ 3,130.68
7/7/89 - 6/29/90	52	$ 80.49	$ 4,185.48
7/7/90 - 6/29/91	52	$ 86.96	$ 4,521.92
7/5/91 - 6/26/92	52	$ 86.96	$ 4,612.40
7/5/92	36	$ 95.94	$ 3,381.04
		TOTAL	$19,831.52

[2] In addition to Attorney David Rosen's affidavit (Dkt. #87), affidavits were submitted by two highly regarded attorneys — Hugh Keefe and Emanuel Margolis (Dkt. ##84-85).

(*Id.* ¶5 & attachments).

A. DEFENDANTS' MOTION FOR RECONSIDERATION

In this motion, without waiving any grounds for appeal on the issue of liability,[3] defendants ask this court for a reduction in the amount of the damages, in that plaintiff's own cardiologist directed him not to return to work as of November 25, 1993. However, as parties' stipulation indicates, plaintiff's pay on injured status was the same as if he had been working, and the damages as of March 5, 1993 were, in fact, $415.50 higher than previously awarded by the Court (Stip. ¶¶1-3, 5, & attachments). Therefore, defendants' motion for reconsideration is *denied.*

B. PLAINTIFF'S MOTION FOR RECONSIDERATION

In this motion, plaintiff asks the Court to reconsider its denial of compensatory damages for emotional distress or pain and suffering. At trial, plaintiff testified that he was "disappointed" and "quite cranky with my family and friends," felt "stressful" and "embarrass[ed]" at not having been promoted, and had many "sleepless nights" as a result (*Tr.* at 31-32, 32-33). In his post-trial brief (Dkt. #61), plaintiff sought $10,000 in damages for each year of discrimination and distress, for a total of $35,000 (at 29-30). The Memorandum of Decision observed that although the law was not "settled" on this issue, several cases were cited which have been denied such damages. (at 40). Plaintiff argues that these cases have been superseded by *Franklin v. Gwinnett County Public Schools,* 112 S. Ct. 1028 (1992), which held that compensatory damages are available in a Title IX case.

Subsequent to *Franklin,* at least two district courts have permitted plaintiffs/employees to assert §504 claims for compensatory damages against defendant/employers, without specifying what those compensatory damages would entail. *See, e.g., Ali v. City of Clearwater,* 807 F. Supp. 701, 704-05

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[3]Defendants have not asked the Court to reconsider the issue of liability, even in light of the plaintiff's recent death.

(M.D. Fla. 1992) (denying defendant's motion to dismiss in action brought by municipal employee terminated from employment after being injured in automobile accident); *Kraft v. Memorial Medical Center, Inc.*, 807 F. Supp. 785, 790-92 (S.D. Ga. 1992) (denying defendant's motion to dismiss in action brought by nurse terminated from employment after being injured in automobile accident). *See also Annuziata v. Frank*, Civ. No. N88-357(WWE), slip op. at 3 (D. Conn. May 27, 1993) (dicta).[4]

In *Doe v. District of Columbia*, 796 F. Supp. 559, 571-73 (D.D.C. 1992), the court awarded the plaintiff $25,000 in compensatory damages for the emotional distress caused by him by defendant's uncertainty in hiring him as a municipal firefighter. Like plaintiff here, Doe had been hired as a probationary firefighter, subject to termination if "any derogatory or adverse information" was disclosed. *Id.* at 564-65. On his own initiative, plaintiff informed defendant that he was HIV-positive; after a series of medical evaluations, plaintiff was advised that the offer of employment had been withdrawn. *Id.* at 565-66. During his one-day trial,[5] he testified that he felt "rejected," that he had been treated like "garbage," and was demoralized. *Id.*

Plaintiff's testimony here certainly was less compelling than that of the plaintiff in *Doe*. Accordingly, compensatory damages are granted to plaintiff in the amount of $500.00.

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[4]Just last month, a district judge denied defendants' motion for summary judgment on the issue of compensatory damages *Miller v. Spicer*, Civ. No. 90-586(MMS), 1993 U.S. Dist. LEXIS 6683, at *23-29 (D. Del. May 7, 1993). In *Miller*, defendants refused to perform emergency surgery on plaintiff's lacerated tendon, after plaintiff was "perceived" to be homosexual and had indicated that he had not yet received the results of an AIDS test (at *2-5). By the time plaintiff was transported by helicopter to a hospital in Washington, D.C., his foot was so swollen that surgery could not be performed for another eight days, resulting in permanent injury to his foot (at *5-7). Thus, in *Miller*, the nature of the compensatory damages sought was apparent.

[5]Defendant did not make a vigorous defense, for it presented no opening statement, no evidence, and no closing argument. *Id.* at 560-61.

C. PLAINTIFF'S APPLICATION FOR ATTORNEY'S FEES

Plaintiff seeks attorney's fees in the amount of $44,025 for the 176.1 hours expended by Attorney Rosen at an hourly fee of $250, $765.00 for the 5.1 hours expended by Attorney Barbara Goren at an hourly fee of $150, and $3,775.95 in costs,[6] for a total of $48,565.95. In addition to objecting to plaintiff's application on the merits of the case, defendants have the following specific objections: (1) counsel should not be compensated more than $50 per hour for his travel time to and from court on the four days of trial; (2) Attorney Goren should not be reimbursed for the time spent editing plaintiff's post-trial brief; (3) Attorney Goren's hourly fee of $150 is excessive; (4) Attorney Rosen's pretrial and post-trial time was excessive; (5) Attorney Rosen's hourly fee of $250 is excessive; and (6) the amounts claimed for the deposition and trial transcripts exceeded the amounts on the invoices received by defendants.[7]

Defendants' first argument was rejected last year by Judge Burns in *Gonzalez v. Town of Stratford*, Civ. No. B91-346(EBB), 1992 U.S. Dist. LEXIS 16248, at *11-13 (D. Conn. Aug. 4, 1992), in which she awarded a uniform rate for time expended by counsel, despite defendants' request to charge a lesser amount for scheduling and travel time.

The Court similarly has no quarrel with respect to Attorney Goren's time and hourly fees — the 5.1 hours spent editing plaintiff's post-trial brief can hardly be characterized as clerical in nature or excessive, *cf. Diaz v. Coleman*, Civ. No. N88-10(PCD), slip op. at 4-5 (D. Conn. Feb. 9, 1990, Magistrate's Ruling approved Mar. 2, 1990) (regarding student research), and the $150 hourly fee is reasonable, *see Welch v. Dayton*,

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[6]These costs are as follows:

Sheriffs' fees for service of deposition and trial subpoenas	$ 168.20
Court Reporting Services — Deposition Transcript	$ 919.91
Court Reporting Services — Trial Transcripts	$2,167.84
Expert Witness Fee — Dr. Radoff	$ 400.00
Court Filing Fee	$ 120.00

[7]Copies of some of these invoices were attached to defendant's brief.

2:91 CV 246(AHN), slip op. at 8-9 (D. Conn. Mar. 25, 1993) (awarding $175/hour to Attorney Katherine Eldergill).

The same holds true with respect to Attorney Rosen's time and hourly fees. As Attorney Rosen's time sheets and affidavit indicate, the amount of time claimed by him was "very modest" (¶9) — 54.9 hours for all pretrial work, 32.2 hours for actual time on trial, and 86.0 hours for post-trial work. The hourly fee of $250 also is reasonable and consistent with similarly qualified and experienced attorneys. *See, e.g., Friends of Animals, Inc. v. Hirsch,* Civ. No. B90-621(WWE), slip op. at 5 (D. Conn. Jan. 20, 1993) (Smith, M.J.) (finding $250 hourly rate charged by Attorney Hugh Keefe to be "fair and quite reasonable for an attorney of [his] substantial experience and skill"); *Gonzalez, supra,* 1992 U.S. Dist. LEXIS 16248, at *6-7, 11 (awarding $250/hour to Attorney Emanuel Margolis).

As to the last item, the difference in the amounts between the invoices presented to plaintiff and to defendants is explained by the number of copies requested (the original for defendants vs. the original plus one copy for plaintiff), the $65.00 attendance fee charged only to plaintiff, the $10.00 jurat preparation fee charged only to plaintiff, and additional sales tax as a result thereof. A party is entitled to costs for an original and one copy. *See Penta Hotel Limited v. Penta Tours,* Civ. No. B86-89(JGM), slip op. at 17-18 (D. Conn. Oct. 16, 1989); *Principe v. McDonald's Corp.,* 95 F.R.D. 34, 37 (E.D. Va. 1982); *Chemical Bank v. Kimmel,* 68 F.R.D. 679, 682 n.1 (D. Del. 1975).

II. CONCLUSION

Accordingly, for the reasons stated above, defendants' motion for reconsideration on the issue of damages (Dkt. #80) is *denied,* plaintiff's motion for reconsideration (Dkt. #81) is *granted* in the amount of $500.00, and plaintiff's application for attorney's fees (Dkt. #83 is *granted* in the amount of $44,790 and $3,775.95 in costs, for a total of $48,565.95.

Dated at Bridgeport, Connecticut, this 18th day of June, 1993.

/s/Joan Glazer Margolis
Joan Glazer Margolis
U.S. Magistrate Judge

In the United States District Court for the District of Connecticut

Walter Kuntz v. City of New Haven, et al.	Civil No. 3:90cv480 (JGM)

SUPPLEMENTAL JUDGMENT

This cause came on for consideration of the defendant's motion for reconsideration on the issue of damages and plaintiff's motion for reconsideration and application for attorney's fees before the Honorable Joan G. Margolis, United States Magistrate Judge, and

The Court having considered the motions and all the papers submitted in connection therewith denied the defendants' motion for reconsideration; granted the plaintiff's motion in the amount of $500.00 and further awarded plaintiff's attorney's fees in the amount of $44,790 and $3,775.95 in costs, for a total of $48,565.95.

It is therefore ORDERED and ADJUDGED that supplemental judgment be and hereby is entered in favor of the plaintiff in the amount of $48,565.95, inclusive of costs, in accordance with the Court's order.

Dated at Bridgeport, Connecticut this 30th day of June, 1993.

KEVIN F. ROWE, Clerk

By /s/Carol E. Cannady
Carol E. Cannady
Deputy in Charge

In the United States District Court for the District of Connecticut

Walter Kuntz v. City of New Haven, et al.	Case No. 3:90CV00480 (WWE)

AMENDED SUPPLEMENTAL JUDGMENT

An Order having been entered on January 3, 1994, by the Honorable Joan G. Margolis, United States Magistrate Judge, directing that the Supplemental Judgment entered on June 30, 1993, be amended such that judgment may enter for plaintiff under both the Rehabilitation Act and the ADA,

It is ORDERED, ADJUDGED and DECREED that amended supplemental judgment be and is hereby entered in favor of the plaintiff under both the Rehabilitation Act and the ADA in the amount of $48,565.95, inclusive of costs, in accordance with the Court's Order.

Dated at New Haven, Connecticut, this 6th day of January, 1994.

KEVIN F. ROWE,
CLERK, UNITED STATES
DISTRICT COURT

BY /s/Frances Consiglio
DEPUTY IN CHARGE

United States Court of Appeals
for the
Second Circuit

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of June one thousand nine hundred and ninety-four.

Present:

HON. J. EDWARD LUMBARD,
HON. DENNIS G. JACOBS, *Circuit Judges,*
HON. JACK B. WEINSTEIN*, *Senior District Judge.*

WALTER KUNTZ,
Plaintiff-Appellee,

v. No. 94-7140

CITY OF NEW HAVEN, CITY OF NEW HAVEN DEPARTMENT OF POLICE SERVICES, WILLIAM FARRELL, NICHOLAS PASTORE Individually, and in his official capacity as current NHPD Chief of Police, ARTHUR FERRUCCI, JOHN McDEVITT, JOSE SANTIAGO, CHARLES VALENTINE, JR., JOHN HORVATH, Individually, and as members of the New Haven Board of Police Commissioners,
Defendants-Appellants.

This appeal from a judgment of the United States District Court for the District of Connecticut (Margolis, J.) came on to be heard on the transcript of record and was argued by counsel.

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*Honorable Jack B. Weinstein, United States District Court for the Eastern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgment appealed from is hereby **AFFIRMED.**

Defendants-appellants appeal from the March 3, 1993 decision of Magistrate Judge Joan Glazer Margolis finding that defendants violated §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 by refusing to promote Kuntz to the position of lieutenant. The Magistrate Judge issued a permanent injunction requiring defendants to promote Kuntz to lieutenant and awarded Kuntz $19,416.02 in back pay.

Kuntz joined the New Haven Police Department as a police officer in 1955; after 14 years, he was promoted to sergeant. In 1984, he suffered a heart attack that left him with a 62.5% permanent partial disability of the heart.

He returned to work on "limited duty", and in 1986 he took and passed the written test for promotion to lieutenant. He was notified by letter dated August 16, 1988 that the Board of Police Commissioners had voted to approve his promotion pending medical clearance. That clearance was never given, as the New Haven Police Department determined that Kuntz was not physically suited for promotion to the rank of lieutenant.

On September 11, 1990, Kuntz commenced an action against the City of New Haven, its police department, and various individuals, alleging that the refusal to promote him from sergeant to lieutenant because of his heart condition constituted a violation of §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. A four-day trial was held before the Magistrate Judge Margolis in January 1992. After the trial, the Magistrate Judge issued a permanent injunction requiring defendants to promote Kuntz to the rank of Lieutenant and awarded Kuntz back pay. The Magistrate Judge also awarded attorneys' fees totaling $48,565. On appeal, defendants argue that Kuntz was not physically capable of performing the duties of a lieutenant. Defendants also challenge the Magistrate Judge's Award of attorneys' fees.

Rehabilitation Act Claim. Section 504 of the Rehabilitation Act provides in pertinent part:

> No otherwise qualified individual with handicaps... shall, solely by reason of her or his handicap, be

> excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

The only issue in this appeal is whether Kuntz is "otherwise qualified" for the position of lieutenant.

The phrase "otherwise qualified" has been interpreted to mean "one who is able to meet all of a program's requirements in spite of his handicap." *School Board of Nassau County v. Arline*, 480, U.S. 273, 287 n. 17 (1987) (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)). In making this inquiry, courts must consider not only the handicapped person's ability to perform the job's functions, but also whether reasonable accommodation by the employer would enable the handicapped person to perform those functions. Accordingly, the "otherwise qualified" inquiry involves a two part analysis: " [A] plaintiff must, in order to make out a prima facie case, show that she or he can perform the essential functions of the job in spite of the handicap either (a) with no need for accommodation, or (b) with a reasonable accommodation." *Gilbert*, 949 F.2d at 642.

Looking first at the job description issued by the New Haven Police Department, the Magistrate Judge found that "the 'essential functions' of the position of lieutenant in the NHPD are overwhelmingly, if not exclusively, supervisory in nature." Turning next to the medical testimony, the Magistrate Judge found that Kuntz could perform these essential functions with reasonable or no accommodation.

Once a plaintiff makes a prima facie showing that he is able to perform the essential functions of the job with reasonable accommodation, the burden shifts to the defendant to show that it is unable to reasonably accommodate the plaintiff. Accommodation is unreasonable if it requires "*elimination* of any of the job's essential functions." *Id.* Defendants argue that accommodation in this case would entail elimination of essential job functions because a New Haven Police Lieutenant must be capable of performing *all* the duties of any subordinate police officer (including physical exertion) *plus* additional supervisory responsibilities. We are unpersuaded.

The Magistrate Judge's findings of fact reveal that "the

'essential functions' of the position of lieutenant in the NHPD are overwhelmingly, if not exclusively, supervisory in nature". While defendants argue that the essential functions of a lieutenant also include jobs entailing physical exertion, we cannot say on the record before us that the Magistrate Judge's finding is clearly erroneous. *See* Fed. R. Civ. P. 52(a) ("Findings of fact...shall not be set aside unless clearly erroneous...) The job description for a lieutenant is devoid of any reference to duties involving physical exertion; nor does that description state that a lieutenant must be capable of performing all duties of any subordinate police officer. *Compare Paegle v. Department of Interior,* 813 F. Supp. 61, 65 (D.D.C. 1993) (handicapped individual denied promotion where job description explicitly stated that all Park Police officers must be able to "fully perform law enforcement functions"). And since defendants do not dispute that Kuntz was capable of performing the supervisory tasks required of a lieutenant, we have no reason to disturb the decision of the Magistrate Judge.

Attorneys' Fees. Defendants next argue that the award of attorneys' fees is excessive, raising the same objections that were previously rejected by the Magistrate Judge. We "note that the scope of our appellate review of attorneys' fee awards is narrow. 'Abuse of discretion' is one of the most deferential standards of review; it recognizes that the district court, which is intimately familiar with the nuances of the case, is in a far better position to make certain decisions than is an appellate court, which must work from a cold record." *In re Bolar Pharmaceutical Co., Inc., Securities Litigation,* 966 F.2d 731, 732 (2d Cir. 1992) (per curiam). The Magistrate Judge carefully listed and explained each component of the attorneys' fee award. There is nothing in the record to indicate that this award constitutes an abuse of discretion.

For the reasons set forth above, the decision of the Magistrate Judge is affirmed.

/s/J. Edward Lumbard
J. Edward Lumbard, U.S.C.J.

/s/Dennis G. Jacobs
Dennis G. Jacobs, U.S.C.J.

/s/Jack B. Weinstein
Jack B. Weinstein, U.S.D.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

United States Court of Appeals
Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of August one thousand nine hundred and ninety-four.

WALTER KUNTZ,
Plaintiff-Appellee,

v. No. 94-7140

CITY OF NEW HAVEN, CITY OF NEW HAVEN DEPARTMENT OF POLICE SERVICES, WILLIAM FARRELL, NICHOLAS PASTORE Individually, and in his official capacity as current NHPD Chief of Police, ARTHUR FERRUCCI, JOHN McDEVITT, JOSE SANTIAGO, CHARLES VALENTINE, JR., JOHN HORVATH, Individually, and as members of the New Haven Board of Police Commissioners,
Defendants-Appellants.

A petition for rehearing with a suggestion for rehearing in banc having been filed by appellant City of New Haven,

Upon consideration by the panel that decided the appeal, it is hereby ORDERED that the petition is DENIED.

The principal ground for rehearing urged in appellant's petition — and the only ground that is not fully addressed and otherwise disposed of in this Court's summary order of June 24, 1994 — is the applicability of Conn. Gen. Stat. 53a-3(9). Since this statutory

argument was first raised in appellant's reply brief, the argument is waived. Appellant failed to call Conn. Gen. Stat. 53a-3(9) to the attention of the Magistrate Judge who issued the injunction. Nor was the statute cited in the initial brief appellant filed with this Court. A reply brief on appeal is not a vehicle for raising a new statutory argument.

/s/J. Edward Lumbard
J. Edward Lumbard, U.S.C.J.

/s/Dennis G. Jacobs
Dennis G. Jacobs, U.S.C.J.

/s/Jack B. Weinstein
Jack B. Weinstein, U.S.D.J.